138-285

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1360.

CLARA KAUFFMAN, PLAINTIFF IN ERROR,

vs.

JAMES C. WOOTTERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED OCTOBER 8, 1890.

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a In the Supreme Court of the State of Texas. Galveston Term, 1890.

JULIUS KAUFFMAN and CLARA KAUFFMAN, Appellants,
vs.
JAMES C. WOOTTERS, Appellee. } No. 2844.

Be it remembered that in the above entitled and numbered cause, lately pending in the supreme court of the State of Texas, holding its sessions in the county of Galveston, at the January term of said court, the session commencing on the first Monday of January, 1890, and ending on the 29th day of March, 1890, Hon. John W. Stayton, ch. justice, and the Hon's Reuben R. Gaines and John L. Henry presiding, a final judgment was rendered on the 21st day of March, 1890, upon the said case and the following proceedings as they appear and are of record in said court, to wit:

b JULIUS KAUFFMAN *et al.*, Appellants,
vs.
JAMES C. WOOTTERS, Appellee.

From Galveston county.

Applied for by Waul & Walker, attorneys for Julius Kauffman *et al.*, on the 18th day of December, A. D. 1889.

Delivered to Waul & Walker this 10th day of January, A. D. 1890.

[SEAL.] ALEX. EASTON,
Clerk of the District Court, Galveston County.

c THE STATE OF TEXAS,
County of Galveston.

At a term of the district court begun and holden at Galveston, within and for the county of Galveston, before the Hon. Wm. H. Stewart, and ending on the 30th day of November, A. D. 1889, the following case came on for trial, to wit:

JAMES C. WOOTTERS, Plaintiff,
vs.
JULIUS KAUFFMAN *et al.*, Defendants. } No. 6677.

1 *2nd Am'd Original Petition. Filed Octo.* 5, 1885.

In the District Court of the State of Texas for the County of Galveston. October Term, A. D. 1885.

JAMES C. WOOTTETS *et al.*
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

Now comes James C. Wootters, who is a resident of the town of Crockett, in the county of Houston and State of Texas, plaintiff in

the above-stated cause, and, by leave of court first granted, files this his second amended original petition in lieu of and substitution for his first amended original petition, filed January 25th, 1884, and all other pleadings theretofore filed by him, and, complaining of Clara Kauffman, who is a resident of the city of Bremen, in the Empire of Germany, and Julius Kauffman, who is a resident of the city and county of Galveston, in said State, and John H. Wootters, who is a resident of said town of Crockett, defendants, respectfully represents—

That heretofore, to wit, in the month of August, A. D. 1873, and continuously thereafter until about April 18, 1876, said plaintiff and William P. Hays were merchants in copartnership, trading and carrying on business as such in said town of Crockett under and by the firm name and style of "J. C. Wootters & Co.," and that

2 in said month of August, A. D. 1873, and continuously thereafter until and long after the institution of this suit, to wit, April 2, 1874, Julius Kauffman, late of said city of Galveston, deceased, was a merchant, trading and carrying on business as such in said city of Galveston under and by the name and style of "Kauffman & Runge," and that the said Clara Kauffman is the widow and sole devisee and legatee of said Julius Kauffman, deceased, and is in the possession, use, and enjoyment of a large amount of property of the estate of her said deceased husband, not exempt from the payment of his debts, devised and bequeathed to her by his last will and testament and of the proceeds of such property so devised and bequeathed to her, and that the said defendant, Julius Kauffman, is the son of Julius Kauffman, deceased, and of the said Clara Kauffman, and is in the possession, use, and enjoyment of a large amount of property of the estate of his said deceased father, not exempt as aforesaid, heretofore given to him by his said mother and of the proceeds of such property so given to him as aforesaid; that in said month of August, A. D. 1873, and continuously thereafter until about February 12, 1874, Henry N. Duble and said John H. Wootters were merchants in copartnership, trading and carrying on business as such, to wit, as "cotton and wool factors and general commission merchants," in said city of Galveston under and by the firm name and style of

3 "Duble & Wootters."

That during the period from said month of August, A. D. 1873, to the month of January, A. D. 1874, the said firm of "J. C. Wootters & Co.," being the owners and having and being legally entitled to the possession of one hundred and thirty-five bales of cotton, delivered the same to the said firm of Duble & Wootters, as factors and commission merchants as aforesaid, at said city of Galveston, and authorized and empowered them, as such factors and commission merchants, to sell the same at said city of Galveston and receive the proceeds thereof and account therefor to them, the said J. C. Wootters & Co.; that the said cotton was so delivered at various times, which said plaintiff is not able more particularly to state, and at the several times of such deliveries as aforesaid the said firm of Duble & Wootters, as the factors and commission mer-

chants of the said J. C. Wootters & Co. as aforesaid, received the said cotton from the said J. C. Wootters & Co. and undertook, promised, and agreed to and with them safely to keep said cotton, and to sell the same at said city of Galveston, and to receive and account for the proceeds thereof as aforesaid, or to deliver the same to said J. C. Wootters & Co., whenever called on by them to do so, at any time before the sale thereof, in pursuance of the power and authority vested in them, the said Duble & Wootters, as hereinbefore
4 stated; that thereafter, to wit, after having so received the said cotton as aforesaid, the said firm of Duble & Wootters, in violation of their said promises and agreements and of their duties in that behalf and of the rights of said J. C. Wootters & Co., unlawfully and fraudulently combining and confederating with said Julius Kauffman, deceased, did turn over and deliver the said cotton to him, the said decedent, without sale thereof, under and in execution of some agreement and scheme, whereby the parties thereto intended and expected to secure advantages and gain to themselves, at the expense and injury of said J. C. Wootters & Co., who were not parties to such arrangement and scheme, had never consented thereto, and had no knowledgo or notice thereof; that said cotton was so delivered by said firm of Duble & Wootters to said Julius Kauffman, deceased, at or about the dates as set forth in the schedule hereto attached, marked "Exhibit A," and hereby made part of this petition, but has not been sold by said firm of Duble & Wootters to said decedent nor delivered by them to him under or by virtue of any power or authority vested in them by said J. C. Wootters & Co. or by law; that on or about February 12th, 1874, said J. C. Wootters & Co. discovered for the first time that their said cotton had been so delivered as aforesaid by their said factors to said Julius Kauffman, deceased, and immediately thereupon gave notice to said de-
5 cedent that they were the owners thereof, and that the same had been so delivered to him unlawfully and without their authority and demanded of him the delivery and restitution thereof to them, but that, notwithstanding such notice and demand, the said decedent wholly failed and refused to make such restitution or delivery or in any manner to account for said cotton to said J. C. Wootters & Co., nor has the same ever been so restored, delivered, or accounted for by said decedent or by any other person, but, as said plaintiff is informed and believes, the said cotton was disposed of by said decedent and placed out of his possession and beyond his control and beyond the jurisdiction of this court before the institution of this suit, and said plaintiff says that on or about the dates set forth in said schedule as the dates of the deliveries of the several lots of cotton therein mentioned by the said Duble & Wootters to the said Julius Kauffman, deceased, by the name and style of Kauffman & Runge as aforesaid, the said Julius Kauffman, deceased, unlawfully, wrongfully, and fraudulently took the said cotton and converted the same to his own use as aforesaid, the said cotton then being in the possession of the said Duble & Wootters, and held by them in said city of Galveston as the factors of the said J. C. Wootters & Co., and that at the dates last aforesaid the said one hundred

and thirty-five bales of cotton were respectively marked as set forth in said "Exhibit A," and were of the average
6 weight of, to wit, five hundred pounds per bale, and that all of said cotton was at and since the date last aforesaid of the average value of sixteen cents per pound, and that by said unlawful and wrongful acts of said Julius Kauffman, deceased, and said Henry N. Duble and John H. Wootters the said J. C. Wootters & Co. and said plaintiff have been damaged in the sum of twenty-five thousand dollars, and that by reason of the premises a right of action accrued to said J. C. Wootters & Co. and to said plaintiff against the said Henry N. Duble and John H. Wootters and Julius Kauffman, deceased, who were the original defendants in this suit, and each of them for the recovery of said cotton, and, if it could not or should not be restored, for the value thereof, with their said damages; and said plaintiff further says that since the institution of this suit the said firm of J. C. Wootters & Co., composed of himself and the said William P. Hays, as aforesaid, has been dissolved by the mutual consent of the members thereof, and that he has purchased, for valuable consideration, and is now the exclusive owner of all the right, title, and interest of said William P. Hayes in and to said firm and the assets thereof, including the said right of action, and prays that he be allowed to prosecute this suit in his own name and for his own exclusive benefit.

And the plaintiff further says that the said Henry N. Duble,
7 who was one of the original defendants herein, has died insolvent since the institution of this suit, and therefore said action is now discontinued as to him.

And said plaintiff further says that the said Julius Kauffman, deceased, who was one of the original defendants herein, since the institution of this suit, to wit, on or about January 17th, A. D. 1880, died at the city of Bremen, in Germany, leaving a will, a copy whereof is hereto annexed, marked "Exhibit B," and hereby made part of this petition, wherein he devised and bequeathed unto said Clara Kauffman all his estate, real, personal, and mixed, wheresoever situated, and appointed August Bettlar, Julius Runge, and Edward T. Austin, of Galveston, Texas, executors of said will in Texas, and said Clara Kauffman executor thereof in Germany, and provided and directed, among other things, that no action regarding his estate should be had in the county or district court beyond the probate of said will and the return of an inventory of said estate, and that no bond should be required of said executors or of either or any of them; and that thereafter, to wit, on or about March 15th, A. D. 1880, upon the application of the said August Buttlar, Julius Runge, and Edward T. Austin, the said will was duly probated and established as the last will and testament of said decedent, Julius Kauffman, and the said appointment of said August Buttlar, Julius Runge, and Edward T. Austin as executors thereof, as aforesaid, was duly confirmed and letters testamentary duly ordered to issue to them as such
8 executors upon their taking the oath of office as prescribed by law in and by the county court of said Galveston county,

the same being a court of competent jurisdiction in that behalf; and it was at the same time ordered by the said court that no further action be had therein in and about the administration of said estate than the filing of an inventory and appraisement thereof; and thereafter, to wit, on or about April 1, 1880, said August Buttlar, Julius Runge, and Edward T. Austin took their said oath of office (a copy of which is hereto annexed, marked "Exhibit F") and duly qualified as executors as aforesaid under said will and the orders of said court, and thereafter, to wit, on or about May 12, 1880, duly filed therein an inventory and appraisement of said estate, a copy of which is hereto annexed, marked "Exhibit C," and hereby referred to.

And said plaintiff further says that the said decedent, Julius Kauffman, by his said will authorized said Buttlar, Runge, and Austin to collect and take possession of his estate in the State of Texas and sell the same and pay the proceeds thereof to said Clara Kauffman, but also, among other things, provided and directed that she might, by power of attorney, take the estate out of the hands of his said Texas executors if she should see fit to do so, or might take charge of the same herself, as will more fully appear by reference to said will, a copy of which, with orders of said county court
9 in relation thereto, is hereto annexed, marked "Exhibit B," and made part of this petition.

Said plaintiff further says that under and by authority of said will the said Clara Kauffman, to wit, on or about September 24th, 1880, by her certain power of attorney, duly recorded in said Galveston county November 6th, 1880, did transfer, make over, and assign and request said August Buttlar, Julius Runge, and Edward T. Austin, Texas executors as aforesaid, to transfer and assign to said defendant, Julius Kauffman, all the real and personal estate and choses in action which by said will she might be authorized to do, and made and appointed said defendant, Julius Kauffman, her agent and attorney to act for her and in her name, place, and stead in all matters of the estate of said Julius Kauffman, deceased, with power to sell and convey all her interest therein, with full power of substitution, as will more fully appear by said power of attorney, a copy whereof is hereto annexed, marked "Exhibit D," and that thereby said Clara Kauffman took said estate and the administration thereof out of the hands of said Buttlar, Runge, and Austin, executors as aforesaid, and vested the same and the management and control thereof in the said defendant, Julius Kauffman; and that thereafter, to wit, on or about January 12, 1881, the said August Buttlar, Julius Runge, and Edward T. Austin, executors as aforesaid, in compliance with said request
10 and provisions of said will, did, by their certain instrument of writing, dated the day and year last aforesaid and duly recorded in said Galveston county January 29, 1881, *did* severally resign and relinquish unto the said Clara Kauffman and said defendant, Julius Kauffman, all their rights as executors in said estate, and notified all persons that they, the said Buttlar, Runge, and Austin, were no longer executors of said estate, as will more fully appear

by said instrument, a copy whereof is hereto annexed, marked "Exhibit E," whereby the said August Buttlar, Julius Runge, and Edward T. Austin, executors as aforesaid, on, to wit, January 12, 1881, and within less than one year after their qualification as such, resigned and abandoned their offices as executors of said estate and the administration thereof, and that there has not since been any legal representative of said estate, but that the same, in the manner aforesaid, passed into the hands, possession, and control of said Clara Kauffman, who, as the sole devisee thereof, received and took the same, charged with and liable, subject to the debts of said Julius Kauffman, deceased; that the said estate in said State of Texas and property composing the same not exempt by law from forced sale or from the payment of the said debts so received and taken by her greatly exceeded in value all claims against said estate, including the amount sued for herein, and was and is assets in her hands charged with and liable and subject to the payment
11 of said debts; and plaintiff further says that after the said Clara Kauffman had so received and taken said estate and property, and while the same was so charged, liable, and subject as aforesaid, she conveyed, transferred, assigned, and delivered, without any valuable consideration therefor, a large portion thereof situated in said State of Texas, greatly exceeding in value the amount sued for herein, to the said defendant, Julius Kauffman, who took and received the same from her charged with and liable and subject to the payment of said debts of said Julius Kauffman, deceased, as aforesaid, well knowing the same to be so charged, liable, and subject; and said plaintiff charges that said defendants, Clara Kauffman and Julius Kauffman, in manner and form as aforesaid, have confederated together with intent to obstruct, hinder, and delay the said plaintiff, as a creditor of said Julius Kauffman, deceased, in the collection of his just claims against said estate; and said plaintiff further says that this suit was tried at the June term, A. D. 1877, of this court, at which trial the jury returned a verdict in favor of said Julius Kauffman, deceased, who was then living and a party defendant in said cause, but failed to render any definite, certain, or legal verdict as to the other defendants therein; and thereupon this court undertook and attempted to render a final judgment in said cause in respect to said Julius Kauffman, deceased, and ordered said cause to be continued for further pro-
12 ceedings as to the other defendants therein; and the said plaintiffs therein thereupon appealed from said judgment and took said cause to the supreme court of this State, wherein it remained pending on appeal until February 11, 1881, when it was ordered by said supreme court that said appeal be dismissed because no final judgment had been rendered in said cause; and said plaintiff says that said Julius Kauffman, deceased, died as aforesaid during the pendency of said appeal, to wit, on January 17, A. D. 1880, and that the said Clara Kauffman was absent from this State from the time of the death of the said Julius Kauffman, deceased, until after the filing of said plaintiff's first amended original petition herein, on, to wit, January 25th, A. D. 1884, whereby she was

made a party defendant to this suit; and that from the time of the death of said Julius Kauffman, deceased, to the time of the failing of said first amended original petition, whereby the said defendant, Julius Kauffman, was made a party defendant herein, he, the said defendant, Julius Kauffman, was absent from this State for and during the following several periods of time, to wit, from about March 1st to about November 1, 1880, and from about April 1 to about November 1, 1881, and from about April 1 to about November 1, 1882, and from about April 1 to about November 1, 1883.

13 And the said plaintiff says that by reason of the premises he is entitled to recover of and from the said defendants, John H. Wootters, Clara Kauffman, and Julius Kauffman, the said cotton, or, if it cannot or shall not be restored to him, the said value thereof, with his said damages; and that said defendants, John H. Wootters, Clara Kauffman, and Julius Kauffman, though often requested, have wholly failed and refused and still so fail and refuse to restore him the said cotton or its said value thereof or any part thereof; and, the said defendants having been haretofore duly cited to appear and answer hereto, he prays that said Clara Kauffman and her said son, Julius Kauffman, be made and treated as parties defendant to this suit, and that the same be proceeded with as if no trial thereof had been heretofore had or attempted, and for judgment against said defendants, John H. Wootters, Clara Kauffman, and Julius Kauffman, for the said cotton, or, if the same be beyond their control, for the said value thereof and for his said damages, and for all such other and further relief as he may be entitled to in the premises.

Oct. 1, 1885.

GEO. MASON,
Attorney for J. C. Wootters, Pl'tff.

14 EXHIBIT A.

Schedule of one hundred and thirty-five bales of cotton of J. C. Wootters & Co., shipped by them to Duble & Wootters, cotton factors, &c., for sale in Galveston, Texas, and delivered by Duble & Wootters, without sale, to Julius Kauffman under and by the name of Kauffman & Runge.

Dates of delivery to Kauffman & Runge.	Marks and number of bales.		
Nov. 3, 1873	P	2	bales.
" " "	P & C	2	"
" 5, "	◇R	4	"
" 6, "	J C E	1	"
" " "	C	1	"
" " "	G G	2	"

Exhibit A—Continued.

Dates of delivery to Kauffman & Runge.	Marks and number of bales.		
Nov. 6, 1873	C M D	1	bales.
" " "	M ◇ J	1	"
" " "	J W G	3	"
" " "	A G	1	"
" " "	J C W & Co	2	"
" 8, "	◇ R	1	"
" 20, "	W B	3	"
" " "	G M C	1	"
" " "	C J D	1	"
" " "	O B	2	"
" " "	D R	1	"
" " "	F W	2	"
" " "	P E	1	"
		32	
Nov. 21, 1873	L D	2	bales.
" 22, "	W D T	1	"
" 24, "	M / J P	2	"
" " "	McM-J-A	1	"
Dec. 1, "	A B	2	"
" " "	T M S	1	"
" " "	J J W	1	"
" 3, "	A H	1	"
" " "	G M C	2	"
" " "	H B L	5	"
" " "	H B L	4	"
" 17, "	B A T	4	"
" " "	G L	2	"
" 18, "	J C W & Co T B	2	"
" " "	J T	1	"
" " "	A S	1	"
" " "	T H ◇ L	4	"
" " "	D R D	1	"
" 20, "	G & H	4	"
		41	

Exhibit A—Continued.

Dates of delivery to Kauffman & Runge.	Marks and number of bales.		
Dec'r 22, 1873	G B	1	bale.
" " "	G G	1	"
" " "	J W G	2	"
" " "	T W	2	"
15			
Dec. 22, 1873	F E	5	bales.
" " "	J V	2	"
" " "	H W A M	1	"
" 24, "	J L	5	"
" " "	C H ◇C	2	"
" " "	W P McH	4	"
" " "	H W A	1	"
" " "	J T	1	"
" " "	Z R	2	"
" " "	E	3	"
" " "	E & W	1	"
" " "	H B | J C W & Co.	1	"
" " "	C B	1	"
" 29, "	H S	1	"
" " "	◇H	5	"
" " "	W S H	1	"
" " "	◇G	1	"
" " "	I W S	3	"
" " "	A T	4	"
" " "	H H	1	"
" " "	W B	4	"
Dec. 29, 1873	W T	2	bales.
" " "	◇A	1	"
" " "	E E H	1	"
" 31, "	W S H	2	"

32
41
56

135 bales.

16 EXHIBIT B.

In the Matter of the Estate of JULIUS KAUFFMAN, Deceased. No. 1255.

MARCH 15TH, 1880.

This day came on to be heard the application of August Buttlar, Julius Runge, and Edward T. Austin, praying for the probate of the last will and testament or Julius Kauffman, deceased, with the codicil thereto and letters testamentary thereunder; and it thereupon appearing that due notice of the filing of said application has been given as required by law, and that no objections thereto have been made or filed; and two instruments of writing, purporting to be the last will of said deceased and the codicil thereto, having been presented and exhibited to the court; and the evidence of Charles F. Hoborst, one of the subscribing witnesses to said will, at present in the city of New York, taken in answer to interrogatories duly propounded — him by said applicants and taken before a duly authorized officer and in the manner provided by law, being presented to the court; and it appearing from said sworn testimony that said deceased signed said paper-writing purporting to be his last will and testament in the presence of said Charles F. Hohorst and C. Ruhl, the other subscribing witness thereto, and thereupon declared the same to be his last will and testament; that said C. F. Ho-

17 hurst and C. Ruhl also signed said will as witnesses thereto at the request of said deceased in his presence and in the presence of each other; and the evidence of George W. Beissner and Jno. H. Schwabel, residents of Bremen, in Germany, who are witnesses to said codicil to said will, taken in answer to interrogatories duly propounded to them by said applicants before an officer duly authorized and in the manner provided by law, being also presented to the court; and it appearing therefrom that said deceased signed said writing purporting to be a codicil to his said last will and testament in the presence of said subscribing witnesses thereto and declared the same to be a codicil to his said last will and testament; that said George W. Beissner and George H. Schwabel also signed said codicil as witnesses thereto at the request of said deceased in his presence and in the presence of each other; and it further appearing from the evidence aforesaid that said deceased was at the respective dates of signing said will and codicil thereto over the age of 21 years and of sound mind, and that all of the said witnesses to said last will and codicil were at the time of signing their names thereto over the age of fourteen years; and it further appearing to the court that said Julius Kauffman is dead, that four years have not elapsed since his decease, and that the court has jurisdiction of his estate; and it further appearing that said applicants are nominated and appointed *and appointed* in

18 said will as the executors thereof and relieved from giving bond for the faithful performance of their trust, and that they are not disqualified by law from receiving said appointment; and it further appearing that said will provides that no action be had in

court in the administration of said estate, it is thereupon considered, adjudged, and decreed by the court that said application be granted, that said will and codicil — re-established and duly proven according to law, and that the same be admitted to probate and, together with the proof thereof, be duly recorded as the last will and testament of said Julius Kauffman, deceased; that the appointment in said will of said August Buttlar, Julius Runge, and Edward T. Austin as the executors thereof be duly confirmed, and that letters testamentary under said will do issue to them upon their taking the oath of office as by the statute prescribed within twenty days from this date; and it is ordered that no further action be had in court in and about the administration of said estate than the filing of an inventory and appraisement thereof; and it is further ordered that E. McLean, J. H. Ruhl, and H. M. Truehart be, and they are hereby, appointed as appraisers to appraise the property of said estate as required by law.

19 THE STATE OF TEXAS, }
County of Galveston. }

In the name of God, amen.

I, Julius Kauffman, of Galveston, in the State of Texas, being of sound mind and disposing memory and of lawful age, being desirous for the settlement of my affairs in case of my death, do make, ordain, and publish this my last will and testament.

Item first. I give and bequeath unto my wife, Clara Kauffman, all my estate, real, personal, and mixed, wheresoever the same may be situated.

Item second. I nominate and appoint my said wife guardian of the persons and estates of our children, and desire that no bond be required of her as such.

Item third. I nominate and appoint my friends, August Buttlar, Julius Runge, and Edward T. Austin, of Galveston, Texas, executors of this my will in Texas, and my said wife sole executor in Germany. I authorize my said executors in Texas to take possession of all my estate in Texas and to realize the same by sale and collection in the most advantageous manner and pay the proceeds to my said wife, her receipt to them to be in full acquittance for the sums receipted for by her. I also empower and authorize my executors to settle with my partners (in the firm of which I am at present a member in company with Julius Runge and C. F. Hohorst, Esqrs.,
20 under the firm name of —— ——) for my interest and realize the same and pay proceeds to my wife. In case of the decease or failure of any of my named executors any one or more of them surviving and qualifying may and shall exercise all the powers granted to all of them herein. I desire that no action regarding my estate be had in the county or district court beyond the probate of this my will and the return of an inventory of my estate, and I desire that no bond be required of my executors or either or any of them. My wife shall have a controlling voice in the management of my estate, but the acts of my Texas executors, done in accordance with the powers hereby vested in them, shall not

be revoked by her, but she may, by power of attorney, take the estate out of the hands of my Texas executors if she shall see fit so to do, or may take charge of the same herself. The powers granted to my said executors in Texas are to sell real estate, stocks, and bonds, collect all debts due the estate, and such other powers as may be necessary to enable them to settle up my estate in Texas without the intervention of courts; and I declare this to be my last will and testament, and as such I sign it at Galveston this 22nd day of April, A. D. 1874, in the presence of C. Ruhl and C. F. Hohorst, of Galveston, subscribing witnesses, who sign the same in my presence and in the presence of each other at my request.

JULIUS KAUFFMAN.

Signed in presence of testator by—

C. RUHL.
C. F. HOHORST.

21 This is a codicil to be added to the last will of me, Julius Kauffman, of Galveston, Texas, U. S. of America, now residing at Bremen, Germany, which bears date April twenty-second, one thousand eight hundred and twenty-four.

First. I do hereby ratify and confirm my said will in all respects *same* so far as any part thereof shall be revoked or altered by this present codicil—that is to say: Whereas my deceased daughter, Auguste, wife of Gustav Schultz, at Stettin, has already received as dotal gift, dowry, and cash advances the sum of about fifty thousand thalers, I exclude her and her child, Udas, born at Stettin on the 28th day of February, 1874, from the succession into my estate. In case, however, my beloved wife should give or bequeath to my said grandson, Udo, a legacy or any amount of money she may think proper, which shall rest in her own will and determination, then my said grandson, Udo, or his guardians shall not receive or enter into the possession of said legacy or donation until he is of lawful age. It is furthermore my desire and I herewith request and obligate my wife that all donations which have annually been made by me to relations and friends shall be continued as heretofore during her lifetime or be relieved by one payment once and forever.

In witness whereof to this present writing, which I hereby declare to be a codicil to my last will and testament and which I direct to be added thereto and to be taken as a part thereof, I have set my hand and seal this twentieth day of September, in the year of
22 our Lord one thousand eight hundred and seventy-eight.

JULIUS KAUFFMAN.

Signed, sealed, and delivered by the said Julius Kauffman as and for a codicil to be added to and considered a part of his last will and testament in the presence of us, who have subscribed our names, and in the presence of the testator.

GEO. W. BEISSNER.
JNO. H. SCHWABEL.

UNITED STATES CONSULATE, }
Bremen, Germany. }

Before me, I. Grumer, acting consul of the United States of America at Bremen, Germany, personally came Julius Kauffman and signed and sealed and declared the foregoing as and for a codicil to and considered as a part of his *law* will and testament in my presence and in the presence of the subscribed witnesses.

In testimony whereof I have hereunto subscribed my name and affixed my seal of office this twentieth day of September, one thousand eight hundred and seventy-eight.

[L. S.] I. GRUMER,
Acting U. S. Consul.

THE STATE OF TEXAS, }
County of Galveston. }

I, P. S. Wren, county clerk in and for Galveston county,
23 State of Texas, do hereby certify that the foregoing nine (9) pages of paper-writing contain a true and correct copy of the last will and testament of Julius Kauffman, deceased, and also a true and correct copy of the "codicil" to said will, together with the order made by the probate court of Galveston county probating said will and "codicil," as all the same appear of record in the probate records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the county court, at Galveston, this the 8th day of June, A. D. 1885.

[SEAL.] P. S. WREN,
County Clerk.

"EXHIBIT C."

In County Court. March term, 1880.

Inventory and appraisement of the estate of Julius Kauffman, dec'd, returned by August Buttlar, Julius Runge, and Edward T. Austin, executors appointed by the will of said Julius Kauffman, and Ephraim McLean, Henry M. Truehart, and J. H. Ruhl, appraisers appointed by the hon. county court of Galveston county.

Real Estate.

Common property in Galveston county and city.

	E. ½ of N. E. ¼, outlot 11, valued at	$2,000
24	N. E. ¼ of N. E. ¼, outlot 42, valued at	2,500
	Lot 8 & part of 9, S. W. ¼ 45, valued at	1,500
Lot 5, block 386, valued at		2,500
Lot 4, block 386, valued at		3,000
Lots 8 and 9, block 686, valued at		2,500

Wild Land in Other Counties.

County.	Grantee.	Acres.
Burnet	Rob't Nowlan	640
Concho	H. C. L. Aschoff	320
	C. W. Dunn	320
	Johann Helmes	320
	F. A. Mueller	320
	Catharune Burkhart	640
Kerr	H. B. Martin	640
Llano	Louis Frank	160
	Fred. Ristan	320
	Jacob Williams	640
Mason	Sophie Koenig	538
	Edgar Len	160
McCulloch	Carl Junker	320
	A. Molzburger	160
	F. W. Roccins	320
	A. Verteni	320
	C. Schmiedecke	320
Menard	I. Kauffman	320
Runnels	F. Klinger	640
25		
San Saba	Fisher & Miller	1,280
	Frans Flich	320
	Ed. Luck	160
	Heinrich Sander	320
Taylor	H. B. Martin	640
Tom Green	H. B. Martin	640
Hardin	Jose C. Lopez	1,476
	A. Thowemier	1,033
Grimes	J. T. Robinson	320
Jackson	Eli Mercer	3,214
Jasper	W. Allen	177
	E. Champion	320
Montgomery	Kennett Hyman	738
	W. C. C. Lynch	1,078
Newton	Jos. I. Cochran	3,900
Milam	Cox	680
Van Zandt		106
Orange	Stephen Iett	673
	Total	23,493
		acres, @ 50c., $11,746.50.
	Jas. Dehlhsas	273
	Jacob Kring	330

Wild Land in Other Counties—Continued.

County.	Grantee.	Acres.
----------	H'ch Robe	320
----------	F. C. Stisser	320
----------	H'ch Vollmer	160
----------	H'ch Weber	320
26		
Kimble ----------	Alt. Bruss	160
----------	C. C. Blam	160
----------	L. G. A. Behrman	640
Llano ----------	Jost. Anares	640
----------	W. C. Eschendremer	640
----------	J. J. Fiestsam	320
----------	W. Fiestsam	160
----------	Michael Fiestsam	320
----------	George Fiestsam	320
----------	Chirst Inmull	640
----------	Philip Jaeger	320
----------	Herm. Jahn	640
----------	F. Holden	320
----------	Geo. Thielman	640
----------	H. Vogelsang	320
----------	Wm. Weil	320
Mason ----------	R. Ashen	320
----------	H'ch Brandt	160
----------	Albert Gresecke	160
----------	S. W. R. Giesecke	160
----------	T. H. Kampell	160
----------	Ieo. F. Murikel	160
----------	Diedrich Steffen	320
McCulloch ----------	Reed Hoecker	640
----------	S. Kage	320
San Saba ----------	F. Gehring	640
----------	G. F. W. Kaiser	640
27 ----------	Adolph Richards	320
----------	F. Stellter	640
----------	Geo. Schmidt	640
	Total	13,563

acres, of which ½ interest, 6,782 acres, 50c., $3,391.

Personal Property.

Bonds:

$17,500 South. Cott. Press & M'f't'g Co., 10 per cent., 105, Nos. 85, 86, 87, 96, 97, 98, 99, 100, 112, 113, 195, 196, 197, 198, 199, at $1,000 each; Nos. 88, 101, 114, at $500 each — $18,375

$5,000 South. Cott. Press & M'f't'g Co., 8 per ct., 101½, Nos. 97, 98, 99, 100, 101, at $1,000 each — 5,075

$4,000 Texas Cotton Press, 8 p'r ct., 101½, Nos. 31, 32, 33, 34, 35, 36, 37, 38, at $500 each — 4,060

$4,500 Galveston Cotton Exchange, 10 p'r ct., 105, Nos. 45, 46, 54, 55, 56, 57, 58, 59, 60, at $500 each — 4,725

$5,000 Galveston wharf, 7 p'r ct. par., Nos. not known — 5,000

Stocks:

476 shares South. Cott. Press & M'f'g Co.: Certificate No. 24, 170 sh.; No. 205, 50 sh.; No. 234, 150 sh.; No. 624, 100 sh.; 786, 6 sh. — 16,184

50 shares Texas Cotton Press & M'f't'g Co., 34, certificate No. 122, 75 — 3,750

28 140 shares Galveston Wharf Co., 35: Certificate No. 41, 66 sh.; No. 42, 66 —; No. 1363, 8 sh. — 4,900

61 shares Galveston Gas Co., 40: Certificate No. 176, 17 sh.; No. 222, 3 sh.; No. 262, 20 sh.; No. 400, 13 sh.; No. 567, 8 sh. — 2,440

22 shares National Bank of Texas, par: Certificate No. 19, 17 sh.; No. 103, 5 shares — 2,200

50 shares 1st Nat'l Bank of Galveston, par, certificate No. 316 — 5,000

76 shares Galveston Bank & Trust Co., par, certificate No. 23 — 7,600

Claims Due the Estate.

1st. Note of Chapman & Harlan, dated Jan. 29, 1877, interest from 29th day of April, 10 p'r ct., secured by real estate — 20,000

2nd. Note of P. H. Erhard, 29 day of April, 1876, interest from 29th day of April, 10 per cent., secured by real estate in Galv. & stocks — 10,000

3rd. Note of L. E. Edmonson, 18 day of Dec., 1876, interest from — day of ——, 12 per cent., secured by mortgage on real estate — Galveston — 11,000

4th. Note of A. C. Crawford, 1st day of April, 1872, interest from 1st day of April, '79, 10 per cent., secured on lot 13, block 681, Galveston — 6,000

5th. Note of E. H. Sieling, 25 day of March, 1878, interest from 25 day of March, '80, 10 per cent., secured by real estate — 4,950

29 6th. Note of H. Homberg, 10th day of Nov'b-, 1870, interest from 2nd day of April, '80, 10 per cent., secured by real estate — 1,300

7th. Note of P. Hoenis, 2 day of June, 1873, interest from — day of ——, 10 per cent., secured by real estate $2,000
8th. Note of Max Maas, 20 day of May, 1878, interest from — day of ——, — per cent., secured by real estate in Galveston 3,500
9th. Note of Wm. Brueggerhoff, 15 day of Aug., 1879, interest from 15 day of Feb., '80, 9 per cent., secured by real estate in Austin 25,000
10th. Note of T. Albertson & Bro., 21 day of June, 1879, interest from 21 day of Dec., '79, 10 per cent., secured by real estate in Tyler 6,000

Interest in the mercantile business of Kauffman & Runge, composed of Julius Kauffman and Julius Runge; value to be ascertained.

Recapitulation.

Real estate in Galveston	$14,000
Real estate in interior counties	15,137 50
Bonds	37,235
Stocks	42,074
Notes	89,750
Int. in firm of Kauffman & Runge	198,196 50

30 *Executor's Oath.*

We, the undersigned, Auguste Buttlar, Julius Runge, and Edward T. Austin, do solemnly swear that the foregoing inventory and list is a full and complete inventory and list of the property and claims of their testator that have come to their knowledge.

AUG. BUTTLAR.
EDWARD T. AUSTIN.

Sworn to and subscribed before me this 12th day of May, 1880.

[SEAL.] JOHN ADRIANCE,
Notary Public for Galveston County, Texas.

Appraiser's Oath.

Estate of JULIUS KAUFFMAN, Dec'd.

We, the undersigned, appointed by the hon. county court of Galveston county to appraise the estate of Julius Kauffman, dec'd, do solemnly swear that the foregoing inventory and appraisement of the estate of Julius Kauffman, dec'd, showing the appraised value of each item of said estate as furnished to us by the executors, is just and correct according to the best of our judgment.

J. H. RUHL,
H. M. TRUEHEART *Appraisers.*

Sworn to and subscribed before me this 12th day of May, 1880.

31 [SEAL.] JOHN ADRIANCE,
Notary Public for Galveston County, Tex.

THE STATE OF TEXAS, }
County of Galveston. }

I, P. S. Wren, county clerk in and for Galveston county, State of Texas, do hereby certify that the above and foregoing is a true and correct copy of an inventory made in the estate of Julius Kauffman, deceased, as the same appears of record and on file in my office.

Witness my hand and seal of the county court this the 25th day of September, A. D. 1885.

[SEAL.]

P. S. WREN,
County Clerk.

"EXHIBIT D."

Know all men by these presents that I, Clara Kauffman, widow of Julius Kauffman, late of Galveston, Texas, but for some years residing in Bremen, Germany, having been empowered by my said late husband, who died on the 17th day of January, 1880, in his last will and testament made at Galveston, on the 22nd day of April, 1874, to transfer and convey the estate of my late husband and the management thereof from the hands of Julius Runge, August Buttlar, and Edward T. Austin, the Texas executors:

Now, therefore, in testimony of the love and affection I bear
32 to my son, Julius Kauffman, and for divers other reasons, I do by virtue of this power of attorney transfer, make over, and assign to my said beloved son, Julius Kauffman, and by these presents do hereby request the executors aforesaid to transfer and assign to my said beloved son, Julius Kauffman, all the real and personal estate and choses in action which by his said last will and testament I may be authorized to do, and to act for me and in my name, place, and stead in all matters of the estate of my deceased husband, Julius Kauffman, and especially to sell all of my interest in any and all real estate of which my said husband died seized and possessed in the State of Texas or elsewhere in the United States of America, and sign, seal, execute, and acknowledge and deliver good and sufficient deed or deeds to the purchaser or purchasers thereof and to receive the consideration therefor, and to release, satisfy, and discharge all my interest in said estate of every name and kind whatsoever, giving and granting unto my said beloved son full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said beloved son or his substitute shall lawfully do or cause to be done by virtue thereof.

33 In witness whereof I have hereunto subscribed my name and affixed my seal the twenty-fourth day of September, in the year one thousand eight hundred and eighty.

CLARA KAUFFMAN.

Signed, sealed, and delivered in the presence of—
C. WERLE.
JOHN H. SCHWABEL.

UNITED STATES CONSULATE, } ss:
Bremen, }

Be it known that on this twenty-fourth day of September, one thousand eight hundred and eighty, before me, W. F. Grinnel, consul of the United States of America at Bremen, personally appeared Clara Kauffman, known to me to be the person described in — who executed and acknowledged the above letter of attorney to be her act and deed for the uses and purposes therein expressed.

In testimony whereof I have hereunto subscribed my name and affixed my seal of office, at Bremen, the day *day* and year above written.

[SEAL.] W. F. GRINNELL, *Consul.*

No. 329. Filed for record Oct. 30th, 1880, at 11½ o'clock a. m. Recorded November 6th, 1880, at 3 o'clock p. m.

34 THE STATE OF TEXAS, }
County of Galveston. }

I, P. S. Wren, county clerk in and for the said county of Galveston, do hereby certify that the above and foregoing is a true and correct copy of a power of attorney from Mrs. Clara Kauffman to Julius Kauffman, bearing date the 24th day of Sept., 1880, as the same appears of record in my office in records of deeds, &c., Book 37, page 8.

In testimony whereof I have hereto set my hand and affixed my official seal, at my office, in the city of Galveston, on this the 8th day of June, 1885.

[SEAL.] P. S. WREN,
County Clerk, Galveston County.

"EXHIBIT E."

THE STATE OF TEXAS, }
Galveston County. }

Know all men by these presents that whereas Julius Kauffman, formerly of Galveston, now deceased, by his last will and testament, which was duly probated and recorded in Galveston county at the March term of the county court of Galveston county, appointed the undersigned his executors of his estate "*of*" Texas, under which appointment we each duly qualified as executors by taking oath and returning inventory without bonds, as provided in said
35 will; and whereas by said will Mrs. Clara Kauffman was made sole devisee and legatee, with full power, by power of attorney, to take said estate out of the hands of the Texas executors and manage the same herself, and the said Mrs. Clara Kauffman having executed her power of possession and appointment by appointing her son, Julius Kauffman, her sole attorney to manage said estate, as per his power of attorney, duly authenticated and recorded in Galveston county on the 30th day of October, 1880, Book 37,

page 8: Now, therefore, we do hereby severally resign and relinquish unto the said Clara Kauffman and her said attorney all our right as executors in said estate, and notify all persons that we are no longer executors of the estate of Julius Kauffman, dec'd.

Witness our hands this twelfth day of January, 1881.

JULIUS RUNGE.
AUG. BUTTLAR.
EDWARD T. AUSTIN.

THE STATE OF TEXAS, }
County of Galveston. }

Before me, I. Lovenberg, a notary public in and for said county of Galveston, on this day personally appeared Julius Runge, August Buttlar, and Edward T. Austin, known to me to be the persons whose names are subscribed to the foregoing instrument, and severally acknowledged to me that they executed the same for the purposes and consideration therein expressed.

36 Given under my hand and seal of office, at Galveston, Texas, this 14th day of January, A. D. 1881.

I. LOVENBERG,
[SEAL.] *Notary Public for Galveston County, Texas.*

Filed for record January 28th, 1881, at 3 o'clock p. m. Recorded January 29th, 1881, at 3 o'clock p. m.

THE STATE OF TEXAS, }
County of Galveston. }

I, P. S. Wren, county clerk in and for said county of Galveston, do hereby certify that the above and foregoing is a true and correct copy of a release of executorship from Julius Runge, Aug. Buttlar, and Edward T. Austin to Mrs. C. Kauffman *et al.*, bearing date the 12th day of January, 1881, as the same appears of record in my office in record of deeds, &c., Book 37, page 143.

In testimony whereof I have hereto set my hand and affixed my official seal, at my office, in the city of Galveston, on this the 8th day of June, 1885.

P. S. WREN,
[SEAL.] *County Clerk, Galveston County.*

EXHIBIT F.

In County Court. March Term, 1880.

Estate of JULIUS KAUFFMAN.

Oath of Executors Appointed by Will.

We, the undersigned, August Buttlar, Julius Runge, and
37 Edward T. Austin, appointed by the will of said Julius Kauffman, which has been duly admitted to probate, executors

thereof, do solemnly swear that the writing which has been offered for probate is the last will of Julius Kauffman, dec'd, so far as we know or believe, and that we will well and truly perform all the duties of executors of said will.

EDWARD T. AUSTIN.
AUG. BUTTLAR.
JULIUS RUNGE.

Sworn to and subscribed before me this 1st day of April, 1880.

C. T. McMAHAN,
Clerk County Court, Galveston County, Tex.,
By WM. T. AUSTIN,
Deputy Clerk.

THE STATE OF TEXAS, }
County of Galveston. }

I, P. S. Wren, county clerk in and for Galveston county, State of Texas, do hereby certify that the above is a true and correct copy of the qualification of executors of the estate of Julius Kauffman, deceased, as the same appears of record and on file in my office.

Witness my hand and seal of the county court this the 24th day of September, 1885.

[SEAL.]

P. S. WREN,
County Clerk.

Filed October 5th, 1885.

ALEX. EASTON,
Cl'k D. C., G. Co.

38 *Am'd Answer to Pl'ffs' 2d Am'd Pet. Filed Oct.* 12, 1889.

District Court, Galveston County, to October Term, 1889.

JAMES C. WOOTTERS *et al.* }
vs. } No. 6677.
JULIUS KAUFFMAN *et al.* }

And now comes the defendant Clara Kauffman, by leave of the court, and appearing for this purpose only, and says that this court has not and should not take jurisdiction over her, nor is she required by the law of the land to answer the complaint of said plaintiffs, because she says at and before the institution of this suit against her, ever since, and at present she is and was a resident of Bremen, in the Empire of Germany, and a non-resident of the State of Texas; that no citation or notice of the pendency of said suit has ever been served upon her personally or within the State of Texas; that service was pretended to be made by a publication in a weekly paper, published in the city of Galveston, called the "Sunday Opera Glass;" that upon motion of defendant, who appeared for that purpose only, the said notice was declared null and void and quashed by this honorable court, and now, again for this purpose only, the said de-

fendant appears and pleads to the jurisdiction of this court, and says that never having submitted to the jurisdiction of this court or appeared or made any appearance except specially to object to
39 the jurisdiction, and never having been served within this State with citation or other notice, and residing in a foreign State, and never having consented to or acknowledged service of process, this court should not and cannot legally take jurisdiction of her person; that so to do would be in violation of the Constitution of the United States and the constitution of the State of Texas, and that such assumption would be without due process of law and contrary to the law of the land; all of which will be verified by the record. Wherefore she prays judgment.

WAUL & WALKER,
Att'ys for Clara Kauffman.

And the said Clara Kauffman, should her plea to the jurisdiction be overruled, still insisting on said plea to the jurisdiction and protesting against this honorable court assuming jurisdiction hereof, and with Julius Kauffman, by leave of the court first had and obtained, and substituting this answer for all, and thus say that the matters and things set forth in said petition are not sufficient for plaintiffs to recover against said defendants; and, further answering, they deny each and every allegation contained in plaintiffs' second amended original petition, filed October 5th, 1885; and of this they put themselves upon the country.

And, further answering, defendants say that the said one hundred and thirty-five bales of cotton in petition mentioned were
40 shipped to the firm of Duble & Wootters, who were doing business in the city of Galveston and advertised and generally known as cotton and wool factors and commission merchants, offering "advances made on consignments, personal attention given to filling orders and receiving and forwarding merchandise;" that said firm was known as purchasers of cotton and filling orders for spinners and also as purchasers of cotton on their own account; that said cotton was consigned by plaintiffs to said firm to be by them disposed of for the benefit of plaintiffs; that before and after the said cotton was received by said Duble & Wootters they made certain advances to plaintiffs for freight and charges, amounting to over eight hundred dollars; that during the said time said Duble & Wootters accepted bills drawn upon them by plaintiffs to the amount of eight or ten thousand dollars, many of them drawn at sight and the others to fall due at various times from November, 1873, until March, 1874; that said drafts, as they fell due and were presented, were paid; that on or about November —, 1873, owing to a heavy pressure in monetary affairs — the cotton market of the United States and in the city of Galveston, cotton could only be sold at very low prices; that plaintiffs limited the price of their cotton to 14½ cents per pound; that owing to advances made by said Duble & Wootters and indebtedness and obligations incurred by them in their business they became seriously embarrassed and so informed the plaintiff
41 James C. Wootters; that said James C. Wootters and the defend-

ant Jno. H. Wootters, one of the partners of Duble & Wootters, being brothers, the plaintiff James C. Wootters, to relieve his brother and the said Duble & Wootters from their embarrassment, agreed to send and did send funds and cotton forward, so that said Duble & Wootters might use the said funds and the proceeds of said cotton or receive advances on said cotton or use the same in any manner they could make it available so as to relieve them from their difficulties. The said Duble & Wootters not being able to realize the price desired by plaintiffs for the cotton, and being authorized to use the said cotton in any manner to relieve their embarrassments, and not being able to sell or obtain an advance on said cotton in the city of Galveston in their capacity as forwarding merchants, they shipped the said cotton to the house of Melley, Forget & Co., receiving an advance thereon from their codefendant, Julius Kauffman, agent of Melley, Forget & Co., as by the plaintiffs they were thereunto authorized, the said Duble & Wootters assuming control of said cotton as owners thereof with the authority and consent of said plaintiffs; that the said cotton was in the possession of said Duble & Wootters and claimed by them as their own property; that said cotton was forwarded and shipped to Melley, Forget & Co. long before said Julius Kauffman, Sr., knew that there was any claimant for said cotton and when it was beyond his control,
42 he never having claimed any right to said cotton or any part thereof; that, trusting in the indicia of ownership, the said Julius Kauffman advanced on said cotton the amount of seven thousand five hundred dollars, the said Duble & Wootters so claiming the same as their individual property as having a right to dispose of the same; all of which defendants will verify. Wherefore they pray judgment, &c.

WAUL & WALKER,
For Def'ts Clara Kauffman & Julius Kauffman.

And the said Julius Kauffman says that the cause of action, if any the plaintiffs have, accrued against this defendant more than two years before the institution of this suit.

WAUL & WALKER,
For D'f'ts Clara and Julius Kauffman.

And these defendants, for further —, say that at the June term, A. D. 1877, of the district court of Galveston county, in this suit, then pending and numbered No. 6677, wherein the said James C. Wootters was plaintiff and the said Julius Kauffman and Duble & Wootters were defendants, and for the same cause of action in said petition mentioned, and the same having been tried before a jury, who rendered their verdict therein in favor of said defendant, Julius Kauffman, since deceased; and thereupon the court rendered
43 judgment for the said Kauffman "that he go hence without day, and that he recover of the plaintiffs his costs in this behalf expended," as by the record and proceedings more fully appears; which said judgment still remains in full force and effect and in

nowise reversed, satisfied, or made void, which they are ready to verify. Wherefore they pray judgment.

WAUL & WALKER,
Att'ys for Def'ts Clara and Julius Kauffman.

Filed October 12th, 1889.

ALEX. EASTON,
Clerk D. C. G. Co.,
By EDWIN BRUCE, *Deputy.*

Defendant Clara Kauffman's Motion to Quash Service. Filed June 6, 1885.

JAMES C. WOOTTERS *et al.*
vs.
JOHN K. WOOTTERS, HENRY N. DUBLE, CLARA KAUFFMAN, JULIUS KAUFFMAN. } No. 6677.

And the said defendant, Clara Kauffman, who makes her appearance by her attorneys for this purpose only and moves the court to quash the service of the citation by publication filed in this cause, because the same was pretended to be served by publication made in a newspaper, published weekly, on Sunday, called the "Sunday Opera Glass," in the city and county of Galveston, and that the said publication was made therein on Sunday, the 4th of May, 44 1884, on Sunday, the 11th day of May, 1884, on Sunday, the 18th day of May, 1884, and on Sunday, the 25th day of May, 1884, and on no other days and in no other newspaper, this suit not being a suit for attachment, injunction, or sequestration. Wherefore she prays that the said citation be quashed.

WAUL & WALKER,
Attorneys Appearing for Mrs. Clara Kauffman for this Motion.

Filed June 6th, 1885.

ALEX. EASTON,
Clerk D. C. G. C.,
By EDWIN BRUCE, *Deputy.*

Order of Court Sustaining Motion to Quash Demurrers and Exceptions of Julius Kauffman Sustained, etc.

J. C. WOOTTERS *et al.*
vs.
J. KAUFFMAN *et al.* } No. 6677.

JUNE 8TH, 1885.

This day came on to be heard the motion of the defendant to quash the service herein on Clara Kauffman; which said motion being duly considered by the court, it is ordered that the service made on the defendant Clara Kauffman be, and the same is hereby, quashed. The opinion of the court being that the petition discloses no cause of action against Julius Kauffman, his demurrer and ex-

ceptions are sustained; to which ruling of the court the plaintiff excepts.

Plaintiff has leave to file an amended original petition in
45 lieu of all former pleadings, and cause continued.

Demurrer and Answer of Julius Kauffman. Filed June 6, 1885.

District Court, Galveston County.

J. C. WOOTTERS *et al.*
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

And for answer to the petition filed in said case against this defendant Julius Kauffman comes and says that the matter and things set forth in said petition as the same are therein set forth are not sufficient in law for the plaintiff to recover against him, and for special exception to said petition the defendant says:

1. It does not appear by said petition that this defendant is in possession of any of the property of the said Julius Kauffman, deceased, either as devisee or legatee under the will of the said Julius Kauffman, deceased, or that as heir he has inherited or is in possession of any of said property.

II. It does not appear by said petition why this suit was not revived against the executors of the last will and testament of the said Julius Kauffman, deceased, the proper legal representatives of his estate.

III. Because no writ of *scire facias* against the legal representatives of said Julius Kauffman, deceased, has been asked for
46 or issued from said court since the death of said Julius Kauffman.

IV. Because the petition attempts to join with the said Clara Kauffman, the sole devisee, legatee, and legal representative of the said Julius Kauffman, deceased, this defendant, who is not charged to be devisee, legatee, or legal representative of said Julius Kauffman, deceased.

WAUL & WALKER,
Att'ys for Julius Kauffman, Defendant.

And, further answering said 1st amendment to the original petition, this defendant says that heretofore, to wit, at the June term, A. D. 1877, of the district court of Galveston county, in this suit, No. 6677, then pending, wherein the said James C. Wootters and William P. Hayes were plaintiffs and Julius Kauffman, deceased, and Duble and Wootters, defendants, and for the same cause of action in said petition mentioned, and the same having been tried before a jury, who rendered their verdict therein in favor of said defendant, Kauffman, deceased, and thereupon the court rendered judgment for the defendant J. Kauffman, deceased, "that he go hence without day, and that he recover of the plaintiff his costs in this behalf expended," as by the record and proceedings more fully

appears; which said judgment still remains in full force and effect and in nowise reversed, satisfied, or made void; and this this defendant is ready to verify by the record. Wherefore he prays judgment if the said plaintiff ought to have or maintain his
47 aforesaid action against him, &c.

WAUL & WALKER,
Att'ys for Julius Kauffman, Defendant.

Filed June 6, 1885.

ALEX. EASTON,
Clerk D. C. G. Co.,
By EDWIN BRUCE, *Deputy.*

Plaintiff's Exceptions to Answer and Plea Filed June 6, 1885, by Def't Julius Kauffman. Filed June 8, 1885.

In District Court for Galveston County, State of Texas. June Term, A. D. 1885.

JAMES C. WOOTTETS *et al.*
vs.
JULIUS KAUFFMAN *et als.* } No. 6677.

Now comes the plaintiff in above-stated cause and excepts to the answer and plea of *res judicata* filed by defendant Julius Kauffman on June 6th, 1885, because the same is insufficient, in this:

1st. It fails to show a final judgment and complete disposition of the matters in controversy by the judgment referred to in said plea.

2nd. It shows a suit prosecuted against several defendants and a verdict and judgment against plaintiffs and in favor of one defendant only without showing any action to have been taken as to the other defendants by the court or what such action, if any, was, or that the case was of a nature capable of being disposed of in
48 piecemeal.

3rd. The matters alleged do not show any legal and valid action by the court in said cause such as now can preclude a hearing upon the merits of this case.

6, 8, '85.

GEO. MASON AND
D. A. NUNN,
Att'ys for Pl'ff.

Filed June 8th, 1885.

ALEX. EASTON,
Clerk D. C. G. Co.,
By EDWIN BRUCE, *Deputy.*

Defendant's Plea to Jurisdiction. Filed Oct. 13, 1885.

J. C. WOOTTERS *et al.*
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

And this defendant, Clara Kauffman, to the 2nd amended petition to the original and 1st amended petition, says that this court has no jurisdiction over her person, for this: That no proper service of citation has been made on her by publication or in any other manner; that said pretended service made by publication in the "Sunday Opera Glass" was null and void, because she says the said newspaper is a weekly newspaper published in the city of Galveston and on no other day excepting Sunday; that said publication was made on Sunday, May 4th, 1884; on Sunday —— 11, 1884; on Sunday, May 18th, 1884, and May 25th, 1884, and on no other days, and that it is forbidden by law that any process shall be served
49 on Sunday except in case of injunction, attachment, or sequestration, and that this suit is not a case of injunction, attachment, or sequestration, which she is ready to verify. Wherefore she prays judgment whether this court can or will take further cognizance of this suit against her.

WAUL & WALKER,
Att'ys for Clara Kauffman, Defendant.

Filed October 13th, 1885.

ALEX. EASTON,
Clerk D. C. G. Co.,
By EDWIN BRUCE, *Deputy.*

Order of Court Granting Leave to John H. Wootters to File His Plea of Discharge in Bankruptcy, etc.

J. C. WOOTTETS *et al.*
vs.
J. KAUFFMAN *et al.* } No. 6677.

OCTOBER 26TH, 1887.

At request of the parties the court appoints E. H. Porter stenographer to take down and report the evidence herein, who, being duly sworn, entered upon that duty. Thereupon John H. Wootters has leave to file his answer by filing his plea of discharge in bankruptcy releasing him from all obligation for the claim sued on.

Original Answer of John H. Wootters. Filed Oct. 26, 1887.

In District Court, Galveston County, Texas.

J. C. WOOTTERS *et al.*
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

50 Now comes the defendant John H. Wootters and, for

answer to the petition of plaintiff, says that on the 29th day of January, 1878, at Galveston, the United States district court for the eastern district of Texas made and granted to this defendant a decree of discharge from his debts as a bankrupt, which discharge is annexed hereto, marked "Exhibit A," and made part of this answer; that the debt sued on by plaintiff was provable under the bankrupt act against defendant; that said defendant was duly adjudged a bankrupt in said court on August 11th, 1877, and the debt sued for by plaintiffs accrued prior to that time, and said debt was not one excepted from the operation of a discharge in bankruptcy, and was provable as aforesaid against this defendant's estate as a bankrupt. Wherefore this defendant prays to be discharged with his costs, and he prays for general relief.

J. R. BURNETT,
Att'y for Def't John H. Wootters.

"EXHIBIT A."

District Court of the United States for the Eastern District of Texas.

Whereas John H. Wootters, of the county of Houston and State of Texas, has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the re-
51 quirements of law in that behalf, it is therefore ordered by the court that said John H. Wootters be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the 11th day of August, 1877, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at Galveston, in the said district, this 29th day of January, A. D. 1878.

[SEAL.] AMOS MORRILL, *Judge.*

(Endorsed on the back thereof:)

No. 586. In the matter of John H. Wootters, bankrupt. Certificate of discharge.

I hereby certify that the within certificate of discharge has been duly recorded by me on the minutes of said court in bankruptcy, in vol. 10, on pages 258 and 259.

Witness my hand and seal of said court, at Galveston, January 29th, 1878.

GEO. C. REVES, *Clerk,*
[SEAL.] By C. DART, *Deputy.*

Filed October 26th, 1887.

ALEX. EASTON,
Clerk D. C., G. Co.,
By EDWIN BRUCE, *Deputy.*

52 *Order of Court Overruling Plea to the Jurisdiction, etc.*

J. C. WOOTTERS *et al.*
vs.
J. KAUFFMAN *et al.* } No. 6677.

OCTOBER 28TH, 1887.

The defendant Clara Kauffman's motion to quash the service was sustained by the court on June 8th, 1885, and on October 13th, 1885, said Clara Kauffman's plea to the jurisdiction was overruled after hearing the evidence thereon; to which ruling she excepted.

Order of Court Overruling Def'ts' General Demurrer and Sustaining Part of Pl'ff's Exceptions and Overruling Defendants' Plea to the Jurisdiction, etc.

J. C. WOOTTERS
vs.
J. KAUFFMAN *et al.* } No. 6677.

OCTOBER 14, 1889.

The defendants' general demurrer, being duly considered by the court, is overruled; to which ruling of the court the said defendants except. The plaintiff's exception to that part of defendants' answer which states "that said firm was known as purchasers of cotton and filling orders for spinners, and also as purchasers of cotton on their own account," is sustained; to which ruling of the court the defendants except. At request of the parties, the court appoints E. H. Porter to take down the evidence herein, who, being duly
53 sworn, entered upon that duty. The defendants' plea as to the service by publication on the defendant Mrs. Julia Kauffman was acted on at the June term, 1885, of this court, and said service, on motion of her attorney, was then quashed, as the publications were made on Sundays, and the cause at said June term was continued, and at the October term, 1885, the said defendant renewed her plea to the jurisdiction and claimed that she was not subject to the jurisdiction of the court, in that no other service had been made on her than said publication; and, it then being the opinion of the court that said service, on the motion of her attorney, had been quashed at the previous term; that she was then, by virtue of the statute, legally in court at the said October term, 1885, and the court now, at its present term, adheres to its said former rulings and is strengthened in the ruling by reason of the further fact that the cause was carried to the supreme court on appeal and the action of the supreme court had on the question of jurisdiction affirming it, it is therefore ordered, adjudged, and decreed that the defendants' plea to the jurisdiction is again overruled; to which ruling of the court the said Julius Kauffman excepts.

Order of Court Sustaining Plaintiff's Objection and Refusing to Let Judgment Rendered June 12, 1887, be Read as Res Judicata.

54 J. C. WOOTTERS *vs.* J. KAUFFMAN *et al.* } No. 6677.

OCTOBER 16TH, 1889.

The defendants offered in evidence the judgment of the court, rendered on the 12th day of June, 1877, under their plea of *res judicata;* also their motion for new trial; and the plaintiff objects to the evidence on the ground that it was not a final judgment and was irrelevant and did not constitute any defense to this suit, and the court sustained the plaintiff's objection and refused to let said judgment be read as *res judicata;* to which ruling of the court the defendants except.

Charge of the Court. Filed Oct. 17, 1889.

J. C. WOOTTERS *vs.* J. KAUFFMAN *et al.* } No. 6677.

Charge of the court to the jury.

GENTLEMEN: This suit was originally brought by the firm of J. C. Wootters & Co. against the firm of Kauffman & Runge and Duble & Wootters, the said firm of J. C. Wootters & Co. being then composed of J. C. Wootters and Wm. P. Hayes, and the said firm of Kauffman & Runge at the time of the alleged cause of
55 action was composed solely of Julius Kauffman, Sr. Since the first institution of the suit the said Wm. P. Hayes sold and transferred all of his interest in the suit and subject-matter in controversy to said J. C. Wootters, and now the said J. C. Wootters is the sole plaintiff and entitled to all the right in the matters in controversy which the firm of J. C. Wootters & Co. were entitled to; and since the original institution of the suit Duble, of the firm of Duble & Wootters, has died insolvent and without administrator, and also since the original institution of the suit John H. Wootters, of the said firm of Duble & Wootters, has been discharged in bankruptcy, and hence no recovery can be had against said John H. Wootters; and since the original institution of the suit Julius Kauffman, Sr., has departed this life, willing his property to his widow, Mrs. Clara Kauffman, and the plaintiff has since the death of Julius Kauffman, Sr., made his widow, Clara Kauffman, and their son, Julius Kauffman, parties defendant; so that J. C. Wootters is now the sole plaintiff in the suit and Clara Kauffman and Julius Kauffman, Jr., and John H. Wootters are only defendants in the suit.

As to the defendant John H. Wooters, he has been discharged in bankruptcy, and as to him your verdict will be that the plaintiff,

J. C. Wootters recover nothing against the defendant John H. Wootters, who has been discharged in bankruptcy.

The defendant, Julius Kauffman, Sr., having died in the
56 early part of the year 1880, thereafter the plaintiff, J. C. Wootters, on the 25th day of January, 1884, filed *their* amended original petition making Clara Kauffman and her son, Julius Kauffman, parties defendant, alleging that said Clara Kauffman was the widow of Julius Kauffman, Sr., dec'd, and that Julius Kauffman, Jr., was the son of said decedent and of said Clara Kauffman, and the said amended petition of January 25th, 1884, seeks to make said Clara Kauffman and her son, Julius Kauffman, liable for the value of the cotton, alleging the conversion of the property by Julius Kauffman, Sr., dec'd, and alleging that his said widow and son were liable for the cotton alleged to have been converted by the deceased, Julius Kauffman, Sr., by reason of the alleged fact that said Clara Kauffman and Julius Kauffman, Jr., had received of the estate of Julius Kauffman, Sr., deceased, property and estate largely in excess of the plaintiff's claim after the payment of all the debts of Julius Kauffman, Sr., deceased. The property of a deceased person is liable for the payment of his debts, and the persons who receive that property are liable for said debts to the extent of the value of the property so received of the estate. Upon the defendants' plea of limitation I charge you that the statute of two years' limitation in order to bar the plaintiff's claim must be two years from the time of receiving
57 the estate of the deceased up to the filing of the petition, not, however, to include in the two years any part of the time of a party's absence from the State of Texas. Two years' limitation would be a bar to plaintiff's action against the widow, Clara Kauffman, and son, Julius, and in order to ascertain whether the two years' limitation has run in favor of Clara Kauffman or her son, Julius Kauffman, you must count from the time that they took possession of the property of Julius Kauffman, dec'd, up to the filing of the plaintiff's amended petition, on the 25th of January, 1884, deducting from the time whatever time they may have been absent from this State after receiving the estate of said Julius Kauffman, dec'd—that is, if the proof shows that Clara Kauffman was absent from the State of Texas at any time between the time that she received the estate of her deceased husband and the 25th of January, 1884, such time of her absence from this State must not be counted in her favor, but must be deducted from the time which elapsed between her reception of her husband's property and the 25th of January, 1884, in order to ascertain whether or not the bar of two years has been completed in her favor; and in order to determine the question of limitation of two years as to the son, Julius Kauffman, the times of his absence from this State must not be counted in his favor, but must be deducted from the time which elapsed between his reception of
58 his father's property and the 25th of January, 1884, in order to ascertain whether or not the bar of two years has been completed in his favor.

The general and well-known custom and usages of trade at the port of Galveston by cotton factors at the time of the plaintiff's con-

signment of the cotton to Duble & Wootters would form a part of and enter into the contract between the consignor and consignee, and if that general custom and usage of trade was that the cotton shipped from the interior was to be sold in the port of Galveston, then the consignee has no right to incumber the cotton and had no right to ship it to a foreign port, and the fact that a few cotton factors may have departed from the general custom and usage would not change the general custom and general usages of the trade, and would furnish no authority to a cotton factor to ship cotton to a foreign market. Cotton factors and commission merchants at the port of Galveston at the time of the consignment of this cotton to Duble & Wootters had no authority to deal with the cotton otherwise than by its sale in the port of Galveston for cash. If the plaintiff directed his cotton not to be shipped to a foreign market, but to be sold in Galveston, then Duble & Wootters had no authority to make any other disposition of the cotton than to sell it in the port of Galveston. Cotton factors and commission merchants at the port of Galveston as such cotton factors had no authority to entrust it to sale to others or to pledge it as a security for an advance to them or to ship it to a
59 foreign port. Persons dealing with cotton factors concerning cotton consigned to them are charged with notice of the extent and limitation upon their powers, and if they deal with them as if they were acting for themselves or as if they were dealing with their own property such persons do so at their peril, and if the transaction be brought in question by the owner of the cotton the burden of proving that the factor had authority to deal with the property contrary to the general custom and usage to sell in Galve-ton is on the persons dealing with the factor and not on the consignor. By the term custom is meant a well established and recognized usage of cotton factors and commission merchants. A usage to make it a custom must be general and well established and well recognized in the trade as the manner of conducting the business by the cotton factors and commission merchants as a class and as a whole, and not the usage of a few firms engaged in the business.

If you believe from the evidence that the cotton in controversy was shipped by the plaintiff to Duble & Wootters, cotton factors at Galveston, and was by Duble & Wootters delivered to Julius Kauffman, Sr., deceased, and shipped by him to a foreign market, then the said Julius Kauffman, dec'd, made himself liable to the plaintiff for the market value of the cotton in the port of Galveston at the time that Julius Kauffman, dec'd, received the same, and
60 would make Mrs. Clara Kauffman and Julius Kauffman, Jr., liable for the said value thereof and interest thereon at 8 per cent. per annum from the time that Julius Kauffman, deceased, received the cotton to the present time, if said Julius Kauffman, Jr., and his mother, Clara Kauffman, received each the property and estate of Julius Kauffman, dec'd, of value largely in excess of the plaintiff's demand.

In case you find for the plaintiff against defendants Clara Kauffman and Julius Kauffman the form of your verdict may be substantially as follows: "We, the jury, find in favor of the plaintiff,

J. C. Wootters, against the defendants Clara Kauffman and Julius Kauffman in the sum of —— dollars, and we further find in favor of the defendant John H. Wootters on his plea of discharge in bankruptcy," specifying in the blank the amount against Clara and Julius Kauffman, including the interest, finding for the gross amount of principal and interest and not separating the interest from the principal.

In case your verdict be in favor of all the defendants, then its form may be substantially as follows: "We, the jury, find in favor of all the defendants." If the plaintiff at the time he shipped the cotton to Duble & Wootters had funds in their hands sufficient to pay the freight charges thereon from the interior to the port of Galveston and cotton-press charges the cotton would not be in-
61 cumbered by such charges, as it was the duty of Duble & Wootters to apply such funds to the payment of such charges, and in such event, if you so find, you will in computing the value of the cotton make no abatement of the value on account of such freight and press charges, but if Duble & Wootters did not have funds of the plaintiff to pay said charges, then the charges would be deducted by you from amount of the value of the cotton.

WM. H. STEWART,
Judge of 10th Judicial District.

Verdict of the Jury. Filed October 17, 1889.

We, the jury, find for the plaintiff, J. C. Wootters, against the defendants Clara Kauffman and Julius Kauffman in the sum of twenty thousand one hundred and thirty-five and $\frac{64}{100}$ dollars ($20,135.64) and we further find in favor of the defendant Jno. H. Wootters on his plea of discharge in bankruptcy.

C. G. KEENAN, *Foreman.*

Filed October 17th, 1889.

ALEX. EASTON,
Clerk D. C. G. Co.,
By EDWIN BRUCE, *Deputy.*

62 *Judgment of the Court.*

J. C. WOOTTERS
vs.
J. KAUFFMAN *et al.* } No. 6677.

OCTOBER 17TH, 1889.

This day, this cause coming on to be heard, came the parties, plaintiff and defendants, by attorneys, and thereupon came a jury of good and lawful men, to wit, C. G. Keenan and eleven others, who, being duly empannelled and sworn, and who having heard the pleadings, evidence, argument of counsel, and charge of the court, retired to consider of their verdict, and afterwards returned into open court the following verdict, to wit:

"We, the jury, find for the plaintiff, J. C. Wootters, against the defendants, Clara Kauffman and Julius Kauffman, in the sum of twenty thousand one hundred and thirty-five and $\frac{64}{100}$ dollars, ($20,135.64), and we further find in favor of the defendant John H. Wootters on his plea of discharge in bankruptcy.

"C. G. KEENAN, *Foreman.*"

Whereupon it is ordered, adjudged, and decreed by the court that the said plaintiff, J. C. Wootters, do have and recover of and from the defendants, Clara Kauffman and Julius Kauffman, the sum of twenty thousand one hundred and thirty-five and $\frac{64}{100}$ dollars ($20,135.64), with interest thereon from date hereof until paid, at the rate of eight per cent. per annum, together with all costs by him in this behalf incurred, for which execution may issue; and
63 further ordered by the court that the said plaintiff take nothing herein against the defendant John H. Wootters, and that he go hence without day and have and recover of and from the said plaintiff all his costs in this behalf incurred, for which execution may issue, and that execution issue for use of officers of court against each party respectively for the costs by them herein respectively incurred.

Defendants' Motion for a New Trial. Filed Octo. 19, 1889.

JAS. C. WOOTTERS & CO.
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

And now come the defendants, Julius Kauffman and Clara Kauffman, and move the court to grant them a new trial in the above cause.

And the said Julius Kauffman for cause says:

1st. That the court erred in instructing the jury upon the defendants' plea of limitation: I charge you that the statute of two years' limitation in order to bar the plaintiff's claim must be two years from the time of receiving the estate of deceased up to the filing of the petition, not, however, to include in the two years any part of the time of a party's absence from the State of Texas, * * *
and in order to determine the question of limitation of two
64 years as to the son, Julius Kauffman, the times of his absence from this State must not be counted in his favor, but must be deducted from the time which elapsed between the reception of his father's property and the 25th of January, 1884, in order to ascertain whether or not the bar of two years has been completed in his favor.

II. Because the court assumes in his charge to the jury that the property received from his mother on or about the 1st of July, 1880, was the property of the estate of his deceased father, the testimony showing that the gift from his mother was of her own property and donated to her son before she had ever received any part of the estate of her husband, deceased.

And the said Clara Kauffman for cause why a new trial shall be granted shows:

1st. That this court has no jurisdiction, it being shown by the testimony and pleadings in the cause that long before, at the time, and ever since the institution of this suit she was a non-resident of the State of Texas and was a resident of the Empire of Germany; that she never appeared personally nor received service of citation or authorized any one to receive service for her, nor did she waive service of citation or authorize any one to waive service of citation or notice of the institution of this suit for her, nor did she authorize any person to appear for her, except to object specially to the jurisdiction of this court, as is shown by the record in the cause,
65 and that the court erred in assuming jurisdiction of the case over the person of her, who, through her attorneys, was protesting against the courts so taking jurisdiction, and that the said several rulings of the court are in violation of the Constitution of the United States, said jurisdiction being taken without "due process of law and against the law of the land," no personal service being made upon her in this State or within the jurisdiction of this court, nor any voluntary appearance being made by her in said suit.

And the said defendants together jointly say that a new trial should be granted—

I. Because the court erred in admitting the notice addressed to Kauffman & Runge and dated February 12th, 1874, to be read as evidence over the objection of defendants, as set forth in bill of exceptions No. I, filed in this cause.

II. Because the court erred in ruling out the testimony offered by defendants to support their plea of former judgment, consisting of the verdict of the jury, the judgment of the court, and the motion for new trial, as shown by the records of this court, at the June term, 1877, and particularly set forth in their bill of exceptions No. 2, filed in the cause.

III. Because the jury found their verdict against the testimony in the cause against the defendant Julius Kauffman, the evidence showing that the said Kauffman received $250,000.00 on the 1st
66 of July, 1880, from his mother, nor does the testimony show that he received any other moneys thereafter from his mother or his father's estate.

IV. Because the court erred in ruling out the interrogatories to plaintiff's witness, Julius Runge, tending to show that there was a great pressure in the money market at the city of Galveston during the fall of 1873 and that there was great financial embarrassment at that time among the merchants generally in the city of Galveston, and would not permit the question to be answered to show to the court what was intended to be proved by the witness and the object of the questions, as fully set forth in bill of exception No. 3, herewith exhibited. Because the court erred in overruling the demurrer to plaintiff's second original petition, filed October 5th, 1885, the said petition showing no cause of action against said Julius Kauffman as heir, legatee, or representative of said Julius

Kauffman, deceased, and the said petition also fails to set forth any property of the Julius Kauffman, deceased, that came into the possession and ownership of said Julius Kauffman, and said petition also fails to set forth any legal right the plaintiff has to bring suit against the said Julius Kauffman or to make said Julius Kauffman a party to the present suit; and for other good and sufficient reasons.

Oct. 19, 1889.

WAUL & WALKER,

67 *Atty's for Defendants Clara Kauffman and Julius Kauffman.*

Filed October 19th, 1889.

ALEX. EASTON,
Clerk D. C., G. Co.,
By EDWIN BRUCE, *Deputy.*

Order of Court Overruling Motion for New Trial.

JAMES C. WOOTTERS *et al.*
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

OCTOBER 28TH, 1889.

Come the defendants, by attorneys, and move the court to grant them a new trial herein, which said motion, being duly considered by the court, is overruled; to which ruling of the court the said defendants except and in open court give notice of appeal.

Defendants' Bill of Exception No. 1. *Filed October* 30, 1889.

District Court, Galveston County. October Term, 1889.

J. C. WOOTTERS & Co.
vs.
KAUFFMAN & RUNGE *et al.* } No. 6677.

Be it remembered that upon the trial of the above cause came on to be heard the defendant Clara Kauffman's plea to the jurisdiction of the court, and the counsel for said defendant offered in evidence to sustain her said plea the affidavit of plaintiffs' counsel,
68 and the order of publication of citation to said Clara Kauffman, and proof of the publication of said citation in the Sunday Opera Glass, with the sheriff's return; the motion of Clara Kauffman to quash said citation and the judgment of the court thereon; also the order of the court overruling defendant's plea to the jurisdiction, entered and made on the 13th of October, 1885, and also the order of the court in overruling said defendant's plea to the jurisdiction, filed by the defendant, Clara Kauffman, on the 13th day of October, 1889, said last above order being made on the 14th of October, 1889, as follows:

Citation.

The State of Texas to the sheriff or any constable of Galveston county, Greeting:

Oath having been made as required by law, you are hereby commanded that by making publication of this citation in some newspaper published in said county once a week for four consecutive weeks previous to the return day hereof you summon Clara Kauffman, defendant, to be and appear before the district court, to be holden in and for the aforesaid county of Galveston, at the courthouse thereof, in the city of Galveston, on the first Monday in June, 1884, then and there to answer the first amended original petition of James C. Wootters, plaintiff, filed in said court on the 25th day of January, 1884 (the original petition filed April 2, 1874),
69 and numbered on the docket of said court 6677, against the said Clara Kauffman, Julius Kauffman, John Wootters, and Henry N. Duble, and alleging in substance as follows: That at divers stated times between September 1, 1873, and March 1, 1874, Julius Kauffman, dec'd, the husband of said Clara Kauffman and father of said Julius Kauffman, and said John H. Wootters and Henry N. Duble unlawfully took and converted to their own use one hundred and thirty-five bales of cotton, the property of James C. Wootters & Co., of the value of $10,800.00; that said plaintiff has acquired by purchase the right of action of said James C. Wootters & Co. against said defendants in this behalf; that said Julius Kauffman, dec'd, has died since the institution of this suit, and that said Clara Kauffman is the widow and said Julius Kauffman is the son of said Julius Kauffman, dec'd, and have each received and have by devise and gift as volunteers property and assets of the estate of said decedent exceeding in value the amount sued for in this action; that plaintiff has been damaged in the sum of $25,000.00, and asks judgment against defendants for said cotton or the value thereof, with his damages, and that said Clara Kauffman and Julius Kauffman be made defendants to said suit and be cited to answer according to law.

Herein fail not, but have you then and there before said
70 court this writ, with your return thereon, showing how you have executed the same.

Issued this the 1st day of May, A. D. 1884.

Witness Alex. Easton, clerk of the district court of Galveston county.

Given under my hand and the seal of said court, at office, this the 1st day of May, A. D. 1884.

Attest: ALEX. EASTON,

[SEAL.] *Clerk of the District Court, Galveston County.*

STATE OF TEXAS, }
County of Galveston. }

This day personally appeared before me, George Mason, the attorney of record of the plaintiff, in the suit of James C. Wootters &

Co. *v.* Julius Kauffman *et als.*, No. 6677 on the docket of the district court of Galveston county, State of Texas, who, being duly sworn, on oath says that he is the attorney of said plaintiff in said suit and solely entrusted with the management thereof for him, and that he is informed and believes and upon such information and belief says that the defendant therein, Clara Kauffman, is a non-resident of this State.

GEO. MASON.

Sworn to and subscribed before me this May 1st, A. D. 1884.
[SEAL.] ALEX. EASTON,
Clerk D. C., G. Co.

71 STATE OF TEXAS, }
County of Galveston. }

Personally appeared before me, F. R. Sharp, agent — "Opera Glass," a newspaper published in the city of Galveston, Texas, who, being duly sworn, declares that the annexed copy of citation in case 6677, James C. Wootters *et al. v.* Julius Kauffman *et al.*, was duly published in said newspaper for four consecutive weeks prior to the return day thereof, the publication days being May 4, 11, 18, & 25, 1884.

F. R. SHARPE.

Sworn to and subscribed before me this 26th day of July, 1884.
[SEAL.] ALEX. EASTON,
Clk D. C., G. Co.

Sheriff's Return.

Received this writ on the 1st day of May, A. D. 1884, at 10 o'clock a. m. of said day, and I executed the same by publishing the same in the Sunday Opera Glass, a newspaper published in the county of Galveston, once in each week for four consecutive weeks previous to the return day thereof. Said publication was made on the 4th, 11th, 18th, and 25th days of May, A. D. 1884, and a printed copy thereof herewith accompanies this return.

Witness my hand officially.

WM. P. OWENS,
Sheriff Galveston County,
By GEO. J. TOWNSEND, *Deputy.*

72 Sh'ff's fee, $1.50, due.

(Endorsed upon back of paper:) No. 6677. In district court. James C. Wootters *et al. vs.* Julius Kauffman *et als.* Citation by publication. Issued this 1st day of May, A. D. 1884. Alex. Easton, clerk D. C., G. Co.)

JAMES C. WOOTTERS *et al.*
vs.
JOHN H. WOOTTERS, CLARA KAUFFMAN, *et al.* } No. 6677.

And the said defendant, Clara Kauffman, who makes her appear-

ance by her attorneys for this purpose only and moves the court to quash the service of the citation by publication filed in this cause, because the same was pretended to be served by publication made in a newspaper published weekly on Sunday, called the Sunday Opera Glass, in the city and county of Galveston, and that the said publication was made therein on Sunday, the 4th of May, 1884; on Sunday, the 11th of May, 1884; on Sunday, the 18th of May, 1884; and on Sunday, the 25th of May, 1884, and on no other days and in no other newspaper, this suit not being a suit for attachment, injunction, or sequestration. Wherefore she prays that the said citation be quashed.

WAUL & WALKER,

73 *Att'ys, Appearing for Mrs. Clara Kauffman for this Motion.*

Filed June 6th, 1885.

ALEX. EASTON,
Clk D. C. G. Co.

J. C. WOOTTERS *et al.*
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

JUNE 8TH, 1885.

This day came on to be heard the motion of the defendant to quash the service herein on Clara Kauffman; which said motion being duly considered by the court, it is ordered that the service made on the defendant Clara Kauffman be, and the same is hereby, quashed. The opinion of the court being that the petition discloses no cause of action against Julius Kauffman, his demurrer and exception are sustained; to which ruling of the court the plaintiff excepts. Plaintiff has leave to file an amended original petition in lieu of all former pleadings, and cause continued.

J. C. WOOTTERS *et al.*
vs.
J. KAUFFMAN *et al.* } No. 6677.

OCTOBER 13TH, 1885.

The suggestion of the death of defendant Duble, who died insolvent and without any assets or administration, and plaintiff
74 dismisses as to him, and the plea as to service by publication on the defendant Mrs. Julia Kauffman was acted on at the last term of court, and the service, on motion of her attorney, was quashed, as the publications were made on four consecutive Sundays, and now the said defendant renews her said plea to jurisdiction and claims that she is not subject to the jurisdiction of the court, in that no other service than said publication was ever had on her; and it being the opinion of the court that said service having, on her motion, been quashed at last term, she is now, by virtue of the spirit of the statute, legally in court at present term, the same as if there had been personal service on her, and to this ruling she excepts.

J. C. WOOTTERS
vs.
J. KAUFFMAN *et al.* } No. 6677.

OCTOBER 14, 1889.

The defendants' general demurrer, being duly considered by the court, is overruled; to which ruling of the court the said defendants except. The plaintiff's exception to that part of defendants' answer which states "that said firm was known as purchasers of cotton and filling orders for spinners, and also as purchasers
75 of cotton on their own account," is sustained; to which ruling of the court the defendants except. At request of the parties the court appoints E. H. Porter to take down the evidence herein, who, being duly sworn, entered upon that duty. The defendants' plea as to the service by publication on the defendant Mrs. Julia Kauffman was acted on at the June term, 1885, of this court, and said service, on motion of her attorney, was then quashed, as the publications were made on Sundays and the cause at said June term was continued, and at the October term, 1885, the said defendant renewed her plea to the jurisdiction and claimed that she was not subject to the jurisdiction of the court, in that no other service had been made on her; that said publication —; and it then being the opinion of the court that said service, on the motion of her attorney, had been quashed at the previous term; that she was then, by virtue of the statute, legally in court at the said October term, 1885, and the court now, at its present term, adheres to its said former rulings and is strengthened in the ruling by reason of the further fact that the cause was carried to the supreme court on appeal, and the action of the supreme court had on the question of jurisdiction affirming it, it is therefore ordered, adjudged, and decreed that the defendant's plea to the jurisdiction is again overruled; to which ruling of the court the said Julia Kauffman excepts
76 and prays that this her bill of exceptions be signed and made a part of the record in the case, the same having been submitted to counsel for plaintiff and presented to the court on the — day of October, 1889.

WAUL & WALKER,
Att'ys for Clara Kauffman.

I hereby certify that on this 30th day of October, 1889, the foregoing bill of exceptions was presented to me, and I approve and certify and sign the same as a true and correct bill of exceptions and order the same to be filed and constitute part of the record of the cause this 30th October, 1889.

WM. H. STEWART,
Judge 10th Judicial District.

Filed October 30th, 1889.

ALEX. EASTON,
Clerk D. C. G. Co.

Bill of Exception No. 2. Filed Oct. 30, 1889.

J. C. WOOTTERS
vs.
J. KAUFFMAN *et al.* } No. 6677.

OCTOBER 16TH, 1889.

The defendants offered in evidence the judgment of the court rendered on the 12th day of June, 1877, under their plea of *res*
77 *judicata;* also their motion for new trial, and the plaintiff objects to the evidence on the grounds that it was not a final judgment and was irrelevant and did not constitute any defense to this suit, and the court sustained the plaintiff's objection and refused to let said judgment be read as *res judicata;* to which ruling of the court the defendants except, and pray that this bill of exceptions be signed and made a part of the record in the cause, which is accordingly done after the same was submitted to plaintiff's counsel.

District Court, Galveston County. October Term, 1889.

J. C. WOOTTERS & CO.
vs.
KAUFFMAN & RUNGE *et al.* } No. 6677.

Be it remembered that — the present term of said court came on to be heard the above-stated case, and, upon the trial of the same, the counsel for Julius Kauffman and Clara Kauffman offered in evidence to sustain the issues on their part the record from the Minute Book No. 13 in the case numbered 6677, being the same cause now on trial and styled J. C. Wootters & Co. *vs.* Duble & Wootters and Julius Kauffman, including the verdict of the jury and the judgment of the court thereon, and also the motion for new trial in the same cause considered and overruled on June 25th, 1877, as follows:

78 J. C. WOOTTERS & CO.
vs.
DUBLE & WOOTTERS and JULIUS KAUFFMAN. } No. 6677.

JUNE 12TH, 1877.

On a former day of this term, to wit, the 6th day of June, A. D. 1877, the plaintiffs appearing by their attorneys and the defendant Julius Kauffman by his attorney, and both parties took leave of the court to amend, and thereupon came a jury of good and lawful men, to wit, Wm. H. Nichols and eleven others, who, being duly empanelled and sworn to try the issue joined between the parties, and the pleadings being read to the jury, John H. Wootters, one of the defendants, thereafter coming into open court and having his appearance entered, and the evidence being given to the jury, and the argument of counsel being heard, as well for the plaintiffs as for the

defendant Julius Kauffman, and the court having given instructions to the jury as to the law of the case, and the jury having retired to consider of their verdict, afterwards, on this 12th day of June, returned into court the following verdict, the counsel for plaintiffs and for the defendant Julius Kauffman being present at the reading of the same, to wit:

"First. We, the jury, find in favor of the defendant Kauffman.

"Second. We, the jury, find in favor of the plaintiffs against
79 the defendants Duble & Wootters for amount for which cotton was sold by Melle, Forshet & Co., less the proven charges for freights, commissions, and other proven charges against the cotton, and interest at the rate of 8 per cent. per annum from —, the date of sale by Meele, Forshet & Co.

"(Signed) W. H. NICHOLS, *Foreman.*"

And the jury, at the time of giving in their verdict, stated to the court, in presence of said counsel of plaintiff and defendant, that they were in their verdict wholly without the necessary evidence to enable them to specify the amount for which the cotton was sold in Europe by Messrs. Melle, Forshet & Co., and that they had not received the evidence necessary to enable them to find what was the amount that the plaintiffs should recover against Duble & Wootters; and thereupon the court solicited of said counsel of the parties some solution of the dilemma, and they failing to make any suggestion in the matter, the said verdict was received by the court.

Wherefore it is considered by the court that the defendant, Julius Kauffman, go hence without day, and that he recover of the plaintiffs his costs in this behalf expended. And it further appearing to the court that the verdict as to the plaintiffs and the defendants Duble & Wootters is too uncertain and insufficient to render
80 judgment thereon, it is therefore considered by the court that this cause be continued for further proceedings between the said plaintiff and the said defendants, Duble & Wootters.

JAMES C. WOOTTERS *et al.*
vs.
JULIUS KAUFFMAN *et al.*
} No. 6677.

JUNE 25TH, 1877.

This day came on to be heard the plaintiffs' motion for a new trial in this cause; which said motion, after due consideration by the court, is overruled, and to this ruling of the court the plaintiffs except and give notice of appeal.

(To this evidence the plaintiffs objected, because the evidence, if offered to sustain any other issue than that of *res judicata*, is irrelevant, and, if offered to sustain the defendants' plea of *res judicata*, is incompetent, because it does not show any final judgment in the case. (Objection sustained; to which defendants except.) To which ruling of the court the defendants then and there excepted, and pray that this their bill of exceptions be allowed and signed and

made part of the record in the case, which is accordingly done, after the same was submitted to plaintiffs' counsel.

I hereby certify that the foregoing bill of exceptions was
81 presented to me on this 30th of October, 1889, and I approve, sign, seal, and certify the same as a true and correct bill of exception, and order the same to be filed and constitute part of the record of the cause.

Oct. 30th, 1889.

WM. H. STEWART,
Judge 10th Judicial District.

Filed Oct. 30th, 1889.

ALEX. EASTON,
Clerk D. C., G. Co.

Statement of Facts. Filed Nov. 29, 1889.

J. C. WOOTTERS & Co.
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

Statement of facts.

Upon the trial of the above cause at the October term, A. D. 1889, of the district court of Galveston, State of Texas, the following proceedings were had: After the pleadings were read, counsel of J. H. Wootters, one of the defendants in the cause, to sustain said Wootters' plea of discharge in bankruptcy, read in evidence the certificate of bankruptcy issued on the 29th of January, 1878, to said John H. Wootters, duly executed and signed by the Hon. Amos Morrill, district judge of the United States district court for the eastern district of Texas.

82 The plaintiff then offered in evidence a transfer from W. P. Hays, to his coplaintiff, J. C. Wootters, of all his interest in the partnership of J. C. Wootters & Co., together with all his interests in this suit, said instrument of sale, transfer, and assignment being dated on the 18th of April, 1876.

The plaintiff then offered in evidence the several exhibits to his second amended original petition filed October 5th, 1885: Exhibit B being a copy of the will of Julius Kauffman, deceased, and the probate thereof, all duly certified from the county court of Galveston county; the Exhibit "C" being a certified copy of the inventery and appraisement of the estate in Texas, of Julius Kauffman, deceased, and his wife, Clara Kauffman, duly executed and filed, showing the value of said estate to be real estate in "Texas," $29,137.59, and personal estate in said State of Texas, $367,255.50, all being the community estate of said Julius Kauffman, deceased, and his wife, Clara Kauffman, one of the defendants. The plaintiff then read in evidence the deposition of A. W. Snyder, taken February 19th, 1875, to the following effect: That witnesss resides at Crockett, Houston county, Texas, and is and has been since February 15th, 1873, railroad agent in charge of freight depot, for the

purpose of transacting the business of the International and Great Northern Railroad at Crockett (this branch of the road formerly known as the Houston and Great Northern railroad), which
83 business is principally receiving and forwarding freight, cotton, and general merchandise; that as such agent he shipped on said railroad for J. C. Wootters & Co., merchants, at Crockett, to the firm of Duble & Wootters, commission merchants, at Galveston, Texas, between October 1 and December 31, 1873, the bales of cotton named and described by marks in a statement attached to and made part of the deposition, giving the dates of shipment and marks and number of bales shipped on such dates, the whole number of bales of cotton amounting to 135 bales, and agrees in marks and brands as shown in Exhibit A to plaintiff's 2nd amended original petition, being description of cotton sued for.

The plaintiff puts in evidence the several exhibits, B, C, D, and E, attached to his 2nd amended petition, filed Oct. 5, 1885, as elsewhere set out in this record, and being in substance as follows: Exhibit B, the will of Julius Kauffman, deceased, duly probated in Galveston county, Texas, March 15th, 1880, and appointment of executors in Texas confirmed. Said will gave and bequeathed to testator's wife, Clara Kauffman, "all his estate, real, personal, and mixed, wheresoever the same may be situated;" appointed August Buttlar, Julius Runge, and Edward T. Austin independent executors in Texas, and testator's wife sole executor in Germany; au-
84 thorized his Texas executors to take possession of and by sales and collections realize all his estate in Texas and pay over proceeds to said wife, and also to settle with his partners for his interests in his mercantile business and realize the same and pay proceeds to said wife; also authorizing said wife at her discretion, by power of attorney, to take estate out of hands of Texas executors or to take charge of same herself, relieving executors from giving bond, and dispensing with any action in court regarding estate beyond the returning of inventory by the executors.

Exhibit C, the inventory and appraisement, duly made and filed by said Texas executors, of common property of said decedent's estate in Texas, amounting to three hundred and ninety-six thousand three hundred and ninety-three dollars ($396,393.00), sworn to by executors and by appraisers May 12th, 1880.

Exhibit D, instrument in writing dated September 4th, 1880, duly recorded in Galveston county, Texas, November 6th, 1880, executed by said Clara Kauffman, reciting powers vested in her by her husband's will, and in testimony of love and affection borne by her to her son transferring, making over, and assigning to her son, Julius Kauffman, and requesting said Texas executors to transfer and assign to him, all the real and personal estate and choses in action of said decedent's estate which she is authorized by said will so to transfer and assign and making said son her attorney, to
85 act for her and in her name in all matters of said estate, and especially to sell her interest therein, &c.

Exhibit E, instrument in writing, dated January 12th, 1881, duly recorded in said Galveston county January 29th, 1881, executed by

said August Buttlar, Julius Runge, and Edward T. Austin, reciting their appointment of executors under said will and their qualification as such, and the powers vested by said will in said Mrs. Clara Kauffman, and her being sole legatee and devisee thereunder; and, having executed the paper above referred to of September 4th, 1880, proceeds: "Now, therefore, we do hereby severally resign and relinquish unto the said Clara Kauffman and her said attorney all our right as executors in said estate and notify all persons that we are no longer executors of the estate of Julius Kauffman, dec'd."

Testimony of J. C. Wootters.

JAMES C. WOOTTERS, plaintiff, then testified to the following effect:

That the 135 bales of cotton designated in Exhibit A at the time it was shipped was the property of J. C. Wootters & Co., composed of James C. Wootters and W. P. Hays; that said cotton was consigned to Duble & Wootters, to be sold at Galveston.

That he purchased from W. P. Hays his interest in the partnership of J. C. Wootters & Co. and his interest in this suit, and is now sole owner of the claim sued on.

86 That he instructed both of the members of the firm of Duble and Wootters to sell the cotton at Galveston and not to ship the cotton abroad.

That he did not learn that the cotton had been shipped abroad until after the failure of Duble & Wootters, which took place in the latter part of February, 1874; that he learned of the failure by telegram from his brother, who is the John H. Wootters of the firm of Duble & Wootters, and then resided in Houston county, Texas, but at the time was at Galveston on a visit; that his brother, in addition to his connection with the house of Duble & Wootters, was also engaged in mercantile business with his father-in-law, John Smith, in the northwestern part of Houston county, near his home; he was also engaged in farming; that the average grade of the cotton, the 135 bales, was good ordinary, and the average weight was 494 lbs. and a fraction for each of the 135 bales.

On cross-examination witness stated:

He was doing business with the firm of Duble & Wootters from the fall of 1867 or 1868.

Witness to the following cross-interrogatories made the following answers:

Q. How did you get this grade of cotton so as to know it was good ordinary?

A. That was the average. We had the weights and the
87 classification of the cotton.

Q. Where are they now?

A. I don't know.

Q. Did you have them?

A. Yes, sir; I had them once.

Q. At what time?

A. I think it was in the fall of 1877.

Q. This suit began in 1873. Did you see them before that?

A. Yes, sir; I think I did. I don't remember whether I did or not before.

Q. Did you ever have them down here with you?

A. I don't think I did, sir.

Q. Do you not know it was important to keep those things?

A. Yes, sir; possibly so, but I do not know where they are. I recollect that after the failure I saw they made an average of the classification here.

Q. Do you recollect that was the classification here?

A. Yes, sir; and some of them were made at home, and the two together made good ordinary. We had, in buying cotton, a way of classing the cotton which was just our judgment.

Q. Do you remember stating, on the trial in 1877, that the average weight was 475 pounds to the bale?

A. Yes, sir.

Q. How did it happen that the weight of this cotton increased from 475 to 494 pounds?

88 A. My attention was called to the weight of the cotton by Mr. Hays. The classification of the cotton was the same. The weight he called my attention to after the trial in June. He said he thought I made a mistake. Then we had some papers and figures that were here, and we found the total weight of the cotton to be 66,993 pounds. This was after we dissolved partnership. He continued working for me until he died.

Q. What did you get the weights from?

A. We got some of the weights there where the cotton had been bought and we got some from here.

Q. You have not got any of those weights?

A. I have hunted for them diligently, but have not been able to find them. We had charge of those papers, but we moved, and the house I moved out of there were a good many old papers left there. I knew the importance of the papers and have looked for them, but have been unable to find them. It is only from the memorandums he made that I got the figures. He was the book-keeper.

Q. You don't know it of your own knowledge?

A. He informed me, and I was satisfied he was correct.

Q. You had no means of knowing except what Mr. Hayes told you?

A. He showed me how he got it—from the weights of the cotton bought and paid for.

Q. Did you settle with those persons from whom you

89 bought?

A. Yes, sir.

Q. When?

A. I settled with some of them when I bought and with some of them afterwards.

Q. Did you have the weights you settled with them for?

A. Yes, sir.

Q. What became of those weights? Have you applied to them for the weights?

A. Some of them I have.

Q. Can you get them or could you get them?

A. They didn't know where they were.

Q. Was that after the failure that you settled with some of them?

A. Yes, sir; some of them.

Q. Were not the weights you settled with them the weights you obtained here?

A. Yes, sir; some of them were. I said that.

Q. The weights you made up in your account sales you made up here?

A. Yes, sir.

Q. In February, 1874?

A. Yes, sir.

* * * * * * *

Q. You stated on the trial in 1877 that the average of this cotton was 475 pounds.

90 A. Yes, sir; that is what I thought then it was.

* * * * * * *

Q. How did you render your accounts to the parties to whom you had to render such accounts in the country?

A. They had samples and weights of the cotton. The books of Duble & Wootters showed upwards of 400 bales of cotton on hand, but in truth there was none.

Q. Did you make accounts current to those different parties?

A. We made up account sales of the classification and weights of the cotton and the prices as it was then.

Q. Did you settle with those prices?

A. Yes, sir.

Q. How much of that cotton did you have to settle for up there when you made those account sales?

A. I would not state, as I don't remember.

Q. I think you have stated heretofore about fifty bales.

A. I wouldn't say positively about that. A good portion of this cotton was raised on our own place. We had to account to our hands for that.

Q. Was there some made on other places?

A. Yes, sir; some of it was our customers' and turned over to us.

* * * * * * *

91 Q. I will ask you with reference to the weight of the bales. You stated, in response to a question on the trial in 1877, as I will read to you: "A. I would suppose some of this cotton was ginned on my own place, and I would suppose this list of cotton would average 464 to 475 pounds; the average weight, probably, 475 pounds." Is that correct?

A. I think I made that statement then, but it was more guess than anything.

Q. I then asked you: "Q. That many pounds to the bale?" and you replied: "A. Yes, sir; 475 pounds per bale the average. I am familiar with all the gins and size of the presses and usual bales

they make from my own press. I have a very good idea of what the bales would average ginned on other presses. The custom of having received cotton is what I got my idea of the average weight of it from." Is that correct?

A. I expect I stated that was the custom of handling or receiving cotton. It was, I suppose, a matter of opinion.

Witness stated that his firm of J. C. Wootters & Co. drew time drafts on the firm of Duble and Wootters, all except about $900.00 of them maturing after the failure; that the amounts of drafts accepted was about $6,000.00. They paid all the drafts presented to them due in January, though the amounts were small. The larger drafts falling due after the failure were paid by him to J. C.
92 Wootters & Co.

Question. On the former trial I asked this question: "Q. You spoke of money going the other way. What was the reason of your sending money to them?" Your answer was: "A. They claimed to be tight for money and needed money. My brother was connected with the business. Mr. Duble kept saying in his letters that he needed money, and the panic would be soon over. I tried to help them as much as I could." Is that correct?

A. I don't remember answering that question that way. I don't remember making such a statement then. I don't remember making that statement, that I tried to help them as much as I could.

Q. Is that true?

A. I stated he wrote letters.

Q. Is the answer true or not, and if it is not true what part is not true? Is it true that they claimed to be tight for money and that they needed money?

A. Duble wrote me he needed money.

* * * * * * *

Q. You said you tried to help them as much as you could?

A. I expect I did say that. I don't say positively I made that statement, because I don't remember positively.

Witness also stated that the reason he gave time drafts
93 that they were holding the cotton to be sold and did not propose to encumber the cotton so as to have the advantage of the cotton market; had shipped upwards of 400 bales of cotton that season, and the books of Duble & Wootters showed that amount on hand, but in truth at the time of the failure there was none on hand. The drafts in favor of Blum, Willis, and others were payable and matured, the first about the 14th of February, 1874, and thence after that date none of the drafts payable in February or afterwards were paid by Duble & Wootters, but were paid by J. C. Wootters & Co. Duble & Wootters had in their hands $1,900 balance due J. C. Wootters & Co. at the time of their failure, and there were outstanding drafts in favor of Blum and Willis & Brother amounting to upwards of $5,000.00 drawn by J. C. Wootters & Co. and accepted by Duble & Wootters.

These drafts were drawn on time instead of at sight, because

plaintiff's firm were holding their cotton in hands of Duble & Wootters for sale so as to have the advantage of the market, and were unwilling to encumber it by drawing sight drafts against it. They had shipped Duble & Wootters that season upwards of 400 bales, and they had or should have had on hand at the beginning of the season 118 bales sent them by plaintiff of the preceding season, and which they reported to plaintiffs to have been sold on September 7th, 1873, netting $6,874.50. If it had been so sold and entered to credit of J. C. Wootters & Co., Duble & Wootters would have
94 been indebted to them all the time. On November 3rd, 1873, the account stood, Duble & Wootters indebted to J. C. Wootters & Co. $3,742.00; on December 31st, 1873, Duble & Wootters owed J. C. Wootters & Co. $3,146.52, and at time of failure, in February, 1874, Duble & Wootters owed J. C. Wootters & Co. about $1,900.00, leaving out the cotton shipped in 1873. The plaintiff's firm had drawn a draft on Duble & Wootters in favor of E. P. Clegg & Co. for $500, and given a note payable at their office to Condict & Co. for $400, both of which matured before the failure of Duble & Wootters, and were paid by them. But to provide for this paper plaintiff's firm had sent Duble & Wootters about $1,000.00 in checks of C. R. Johns & Co. on Ball, Hutchings & Co., being proceeds of certain school warrants belonging to plaintiff. The other drafts which have been referred to were in favor of L. & H. Blum and P. J. Willis & Bro., being about $5,000.00, and matured after the failure, and were subsequently paid by plaintiff's firm; that when witness spoke of his firm trying to help Duble & Wootters all they could he referred to its having sent them the money to provide for the paper in favor of Clegg and Condict, and to the question, "You did not wish to draw upon them for money on your account?" answered, "No, sir; that's it. I didn't want them to pay money out for me;" and also stated that at the time of the failure Duble & Wootters had or should have had a balance of $1,900.00 in
95 money to credit of J. C. Wootters & Co. remaining after payment of all drafts then matured.

Testimony of Wm. Selkirk.

WM. SELKIRK, for plaintiff, testified—

That he was the book-keeper for Duble & Wootters; had been in their employment from 1867 until after their failure, in 1874; that the 135 bales of cotton described in Exhibit A by marks and brands were received by Duble & Wootters and from the delivery-order book of Duble & Wootters (to wit, the book containing letter-press copies of their delivery orders on the Factors' Press), nearly all of which orders were signed by Mr. Duble himself. All of said 135 bales of cotton as designated by their marks and brands and described in Exhibit A were delivered to Julius Kauffman, under the name of Kauffman & Runge, on the several dates in said exhibit entered. The course of business was that the Factors' Press had instructions from Duble & Wootters to receive all cotton consigned to them and to send them receipts for the same, with samples, which they did.

Witness then exhibited the receipts from the cotton press, showing the reception of the said 135 bales of cotton by it for account of Duble & Wootters, and their delivery orders on the press in favor of Kauffman & Runge, showing the transfer and delivery of the same cotton to defendant Julius Kauffman, deceased. Witness recollected a conversation once between J. C. Wootters and Mr.
96 Duble, when Mr. Duble suggested the shipping of the cotton. It was in the summer before the cotton commenced to come in, and Maj. Wootters said he wanted the cotton sold in this market. This conversation was in the summer of 1873. A letter was written during the winter months after the conversation giving like instructions; that the shipment of cotton abroad for sale was by Mr. Duble, nor did his partner, Mr. Wootters, have any knowledge of said shipments so far as the witness knows. He resided in the country, about 200 miles away, and for a year before the failure was very seldom here, but Mr. Duble resided here and managed the business.

It was admitted that the marks of the cotton mentioned by witness are the same as set out in plaintiff's petition, and it is also agreed that all the bales of cotton sued for in the petition are identified by the receipts of the Factors' Press to Duble & Wootters.

Testimony of Jno. H. Wootters.

JOHN H. WOOTERS, for plaintiff, testified—

That he was a member of the firm of Duble & Wootters and brother of the plaintiff. During the partnership he resided in Houston county. Mr. Duble managed the business of the firm in Galveston. I was a partner in the mercantile firm of Smith & Wootters, in Houston county. Mr. Smith was my father-in-law, and I attended to the business, and also attended to my farming interest, between 600 or 800 acres. The firm of Duble & Wootters were cotton
97 factors and commission merchants and were advertised as such, and our business was to sell produce shipped here. I gave no attention to the management of the business in Galveston at any time. The attention I gave to the business was outside entirely. I was only in Galveston twice in 1873, and then mainly on business of my firm in the country, and remained but a day or two at each time. I rarely looked in the books of Duble & Wootters, and when I wished our accounts with me in the country I got the book-keeper, Mr. Selkirk, to furnish me memorandums. I had no knowledge of Mr. Duble shipping cotton abroad excepting in a very few instances, one in which he was concerned with a man named McLendon. He was handling some cotton for him personally and some for his father-in-law, Capt. Chubb, all of which was done by a special arrangement with those parties, in which I had no interest. Those are the only instances I knew of his shipping cotton abroad. The firm suspended and dissolved under my direction. I came down to Galveston from information I received from my wife, who was here on a visit, that Mr. Duble was inattentive to his business, out late at night, and rarely at home. I then looked over the books and found the condition of things that there were no assets of the

firm on hand. The cotton ledger showed there should have been over 400 bales of cotton on hand, and upon examination found that there was not more than four, five, or six bales. Upon ascertaining
98 the condition of things I went and saw my friends and engaged counsel and published a notice putting the firm in liquidation and calling a meeting of the creditors and submitted a statement to them. I further found that the delivery-order book showed that many of the delivery orders were made in favor of Kauffman & Runge. This was on the 9th February, 1874. On the 12th of February, 1874, I signed and delivered to Mr. Kauffman a notice notifying him that he would be held responsible for any cotton he had received from the firm of Duble & Wootters since 1st of September, 1873, the property of which he had not acquired by absolute and complete sale by me personally as agent for the owners of the cotton and for Duble & Wootters in liquidation.

The notice as herein set out, after evidence of witness on re-examination, was then read in evidence by plaintiff.

On cross-examination witness testified—

That some time in the fall of 1873 I heard or got a letter from Dr. Looney, of Oakwood, a customer of the house and a friend of mine, saying that he had heard that the house was about to fail. I wrote to him to come down here and see for himself, and he came down and returned home perfectly satisfied.

Q. Did yourself and brother have a communication about it (the letter from Dr. Looney)?

A. At one time I got a letter from Mr. Duble while I was in
99 Crockett. Whether it was about that time or not I don't remember; but I think it was some time in the fall of 1873.

Q. Do you recollect saying on a former trial, "My brother and I consulted together, and we shipped him cotton enough to pay every dollar he owed within two or three weeks"?

A. No, sir; I never said that I am satisfied. That testimony was taken in 1877, and I have read it over once or twice, and I find it is not correctly reported. I think we shipped him cotton right along, and possibly in saying "we" I meant Smith & Wootters.

Q. Do you mean that that was all you intended to do to help your house?

A. I was getting in cotton from other parties that owed.

Q. You didn't intend that the cotton that Smith & Wootters sent down was to pay only what Smith & Wootters owed?

A. There was no expectation of Smith & Wootters paying Duble & Wootters' debts. I didn't expect that firm to pay the other's debts, notwithstanding I have had to pay their debts since. At the time, say about the beginning of the fall, Smith & Wootters were indebted to them, and Smith & Wootters were shipping cotton right along to more than pay those debts. It was intended that Duble was to use that cotton right along, so far as my cotton was concerned, and we were getting in other cotton and sending it to him.

100 Q. As far back as 1885 do you remember making this statement: "Ques. You and Major Wootters consulted about the business and upon that consultation you determined to send down cotton, and you sent for your firm and your brother for his—that is, you and your brother were not acting jointly; you had no joint interest. Ans. No, sir; that was the only time we had a conversation about it." Is that correct?

A. That is about the same thing I say to-day.

Q. What was the result of that consultation?

A. Just as I state right there.

Q. That he said he would send him down cotton, and that you would send him down cotton?

A. Yes, sir.

Q. To help him out of his difficulties?

A. Yes, sir; of course.

* * * * * * *

Q. I find this in the statement of facts of 1877: "Q. Did you send him down much in December? A. Yes, sir. During December, up to the 1st of February, we had shipped in all 192 bales." Is that correct?

A. Yes, sir.

Q. I notice further in that statement: "Q. Did your brother help him along in the same way? A. Yes, sir; he was shipping
101 cotton the same way." Is that correct?

A. Yes, sir; he was shipping cotton all during the season; I believe altogether about 400 or 500 bales.

Witness stated that after the failure of Duble & Wootters, in order to settle with their customers and shippers of cotton to the house, accounts of sale were made out for them; thus Mr. Duble went to a private safe and took from it a book which had the marks of the cotton in it, and he classed it and gave the prices according to the quotations on those days. I then had Mr. Selkirk to make up the account sales so the parties would be settled with. There was no sale of the cotton. We just made it up. The people were there and the whole matter was placed before them. That was the only way it could be done to arrive at a basis. The account sales were made up for my brother in the same way.

On re-examination witness stated—

That on the 9th of February, 1874, the firm of Duble & Wootters was indebted to the firm of Smith & Wootters between six and seven thousand dollars, which was a clear loss. We paid after that five or six thousand dollars accommodation paper. The cotton sent down by Smith & Wootters was sent down to help Duble & Wootters and to be used by Duble if he needed it; does not know that J.
102 C. Wootters & Co. shipped cotton to Duble & Wootters to be used in the same way. The cotton shipped by J. C. Wootters & Co. was to be sold in this market; that was their instructions; remembers writing a letter to Duble that his brother would help him if he needed money by letting him have real estate if he could raise money on it. My brother did not at any time, so far as I know,

authorize Duble & Wootters to take their cotton and use it by shipping abroad or by hypothecating or in any way except to sell it in this market and apply to their credit. The instructions of J. C. Wootters & Co. were that their cotton should not be shipped to Liverpool or any other foreign port. Duble never called on witness's brother for the use of the real estate he had offered, as already stated, so far as he knows. The firm seems to be getting on without it. Nothing more was said about it. Neither J. C. Wootters nor J. C. Wootters & Co. ever authorized their cotton to be shipped to Liverpool or any other foreign port. Their instructions were that it should not be shipped.

The notice to Kauffman referred to in witness's testimony was as follows:

GALVESTON, TEXAS, *Feb'y 12th*, 1874.

To Mess. Kauffman & Runge, present.

GENTLEMEN: You are hereby notified that the cotton here-
103 inafter more particularly designated, for which you have heretofore received delivery orders on the Factors' Press from the late firm of Duble & Wootters, was at the time such delivery orders were given and still is the property of the customers of said firm, who had placed it in their hands with authority only to sell the same in the customary and lawful course of business, but with no authority to dispose of it or part with the possession or control of it in any other manner whatever, and that said cotton is still the property of said original owners, whose rights are unaffected by any transactions of said firm not in strict conformity with said authority in them vested; that said cotton is still the property of said original owners, whose rights are unaffected by any transactions of said firm not in strict conformity with said authority in them vested; that said cotton, not having been delivered to you in accordance with said authority, remains in your hands the property of said original owners, and I, as their agent and in their behalf, and also as one of the members of said late firm and authorized to act for it in liquidation, do hereby demand from you the restoration of said cotton and the possession thereof, and, as agent as aforesaid and acting for said firm in liquidation as aforesaid, I hereby notify you that
104 should you fail to deliver up to me the said cotton in compliance with this demand, or should you permit said cotton to pass into the possession or control of any other person or persons, you will be held responsible for any damage that may result from your action in the premises. The cotton above referred to is that described as follows, to wit: Twenty-one bales marked H. M. and one bale marked H. M. D. W., for which delivery order on said press was given to you by said firm on or about the 9th inst., and also all other cotton placed in your possession or under your control by said firm since the 1st day of September last, the property in which you have not acquired by absolute and complete sale in the customary and lawful course of business.

JNO. H. WOOTTERS,
Ag't of the Owners of the Above-Described Cotton
& for Duble & Wootters, in Liquidation.

Deposition of Julius Kauffman.

Plaintiff then put in evidence the deposition of defendant Julius Kauffman, taken May 15th, 1884, as follows: To the 1st, 2nd, and 3rd interrogatories he answers that his name is Julius Kauffman; that he is 27 years of age; a merchant by occupation, and resides in Galveston, Texas; that he is the son of Julius Kauffman, deceased, one of the original defendants in this suit, and of Mrs. Clara Kauffman, his widow, now one of the defendants in this suit; and
105 to the succeeding interrogatories he answers as follows:

4th Q. Have you not received from the estate of your father since his death, either directly or indirectly, money, property, or interests in property to the value of more than $25,000.00? Please answer fully and state when and how you have received the same.

4th A. I have. I received the same after my father's death.

5th Q. If you answer the last preceding question in the negative, then please state whether you have not received as a gift or gifts from your mother money, property, or interests in property to the said amount of $25,000.00 which she derived from your father under his will. Please answer fully and state when and how you have received the same.

5th A. The interrogatory last preceding having been answered in the affirmative, this requires none.

6th Q. If you say that you have not received, directly or indirectly, from your father's estate or as gifts from your mother such money, property, or interests of the value of $25,000.00, then please state how much in value you have so received—that is, either directly
106 or indirectly—from your father's estate or as gifts from your mother of money, property, or interests in property or the proceeds thereof which she derived from your father's estate under his will or otherwise. Declare fully.

6th A. This interrogatory requires no answer.

7th Q. Has not your mother, the said Mrs. Clara Kauffman, received from your father's estate money, property, or interests in property or the proceeds thereof to the amount or value of $25,000.00 over and above what she has given you? If you say she has not, then please state how much in value she has so received of said estate, to the best of your knowledge and belief, and give your means of knowledge.

7th A. She has.

8th Q. Please state what was the value of your father's estate over and above all his debts and liabilities at the time of his death, to the best of your knowledge and belief. What was the amount shown by the inventory and appraisement of said estate? Has such estate increased or diminished since his death, and to what extent?

8th A. About $500,000 (five hundred thousand dollars).
107 The property has increased, but I don't know how much.

9th Q. Have you not been informed, and do you not believe it to be a fact, that your father or the house of Kauffman and Runge, then composed exclusively of himself, received from the firm of Duble

& Wootters the cotton described in the first amended original petition, filed in this case January 25th, 1884, it being the same cotton claimed by the plaintiffs on the former trial of this suit, in June, A. D. 1877?

9th A. I am not conversant with the first amended original petition, so cannot answer.

Plaintiff's 1st Am'd Original Petition, Substance of, etc.

Plaintiff then read in evidence the substance and statements contained in plaintiff's first amended petition, filed January 25th, 1884, which, among other things, says that James C. Wootters, resident of Houston county, Texas, plaintiff, "complaining of Clara Kauffman, who is a resident of the city of Bremen, in the Empire of Germany, and Julius Kauffman, who is a resident of the city and county of Galveston, in said State, and John H. Wootters, who is a resident of the said town of Crockett, and Henry N. Duble, whose residence is to said plaintiff unknown, defendants, respect-
108 fully represents that in August, 1873, and continuously afterwards till about April 18th, 1876, plaintiff and William P. Hayes were merchants in partnership, carrying on business under firm name of J. C. Wootters & Co., at town of Crockett, in said Houston county." * * *

"That in said month of August, A. D. 1873, and continuously thereafter until and long after April 2, 1874, Julius Kauffman, late of said city of Galveston, deceased, was a merchant, trading and carrying on business as such in said city of Galveston under and by the name and style of 'Kauffman & Runge,' and that the said Clara Kauffman is the widow and sole devisee and legatee of said Julius Kauffman, deceased, and is in the possession, use, and enjoyment of a large amount of property of the estate of her said deceased husband devised and bequeathed to her by his last will and testament and of the proceeds of such property so devised and bequeathed to her, and that the said defendant, Julius Kauffman, is the son of the said Julius Kauffman, deceased, and of the said Clara Kauffman, and is in the possession, use, and enjoyment of a large amount of property of the estate of his said deceased father heretofore given to him by his said mother and of the proceeds of such property so given to him as aforesaid"; that said first amended petition then sets out the transactions between J. C. Wootters
& Co. and Duble & Wootters and between the latter and
109 Julius Kauffman, deceased, out of which plaintiff's cause of action against said decedent and said Duble and Wootters originally arose, substantially as the same are now stated in plaintiff's second amended petition, filed Oct. 5, 1885, and claims that by reason of the premises a right of action had accrued to said plaintiff against said defendants and each of them for the recovery of the cotton alleged to have been so converted or for its alleged value, with damages, &c.; that since institution of this suit the firm of J. C. Wootters & Co. has been dissolved, and plaintiff, by purchase from his partners, has become the sole owner of all the assets of said firm, in-

cluding said right of action and claim herein asserted, and then proceeds as follows, to wit: "And said plaintiff further says that the said Julius Kauffman, deceased, originally one of the defendants herein, has died since the institution of this suit, and that by his last will and testament, heretofore duly probated in the county court for said Galveston county, said decedent devised and bequeathed all of his property and estate, real, personal, and mixed, wheresoever situated, unto the said Clara Kauffman, and appointed her the sole executrix of said will in Germany, and also appointed August Buttlar, Julius Runge, and Edward T. Austin executors thereof in said State of Texas, and, among other things, provided and directed
110 that no bond should be required of said executrix or executors and no action regarding said estate be had in the county or district court beyond the probate of said will and the return of an inventory of said estate, and also provided that said Clara Kauffman might by power of attorney take said estate out of the hands of said Texas executors if she should think fit to do so, or might take charge of the same herself; and said plaintiff further says that thereafter the said Buttlar, Runge, and Austin duly qualified as such executors under the said will and the order of said county court, and duly returned an inventory of said estate, and that thereafter the said Clara Kauffman, by her power of attorney and appointment, did take the said estate out of the hands of said Texas executors and place the same in the hands, possession, and control of the said defendant, Julius Kauffman, and thereafter *to* said Texas executors, to wit, August Buttlar, Julius Runge, and Edward T. Austin, by their certain instrument of writing, did severally resign and relinquish unto the said Clara Kauffman and the said defendant, Julius Kauffman, all their right as executors in said estate, and did turn over and deliver the said estate to them, the said Clara Kauffman and Julius Kauffman, defendants herein; and said plaintiff says that since the death of the said Julius Kauffman, deceased, the said Clara Kauffman and said defendant, Julius Kauff-
111 man, have each of them received and applied to their own use as aforesaid property of the estate of the said Julius Kauffman, deceased, of much greater value than the amount sued for in this cause, and prays that they be made defendants hereto and be duly cited to appear and answer this petition; and said plaintiff further prays judgment against each and all of the defendants herein for the said cotton hereinbefore mentioned, and for said damages and costs of suit, and for all such other and further relief as he may be entitled to in the premises."

Plaintiff then offered in evidence the citation to Julius Kauffman, Jr., now defendant, issued on the 25th of January, 1884, under said amended petition and service thereon regularly made on him on the 26th day of January, 1884.

Plaintiff then offered the following:

District Court, Galveston County.

J. C. WOOTTERS *et al.*
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

And for answer to the petition filed in said case against this defendant Julius Kauffman comes and says that the matters and things set forth are not sufficient in law for the plaintiff to
112 recover against him, and for special exception to said petition the defendant says:

I. It does not appear by said petition that this defendant is in possession of any of the property of the said Julius Kauffman, deceased, either as devisee or legatee under the will of the said Julius Kauffman, deceased, or that as heir he has inherited or is in possession of any of said property.

II. It does not appear by said petition why this suit was not revived against the executors of the last will and testament of the said Julius Kauffman, deceased, the proper legal representatives of his estate.

III. Because no writ of *scire facias* against the legal representatives of said Julius Kauffman, deceased, has been asked for or issued from said court since the death of said Julius Kauffman.

IV. Because the petition attempts to join with the said Clara Kauffman, the sole devisee, legatee, and legal representative of the said Julius Kauffman, deceased, this defendant, who is not charged to be devisee, legatee, or legal representative of said Julius Kauffman, deceased.

WAUL & WALKER,
Att'ys for Julius Kauffman, Defendant.

And, further answering said 1st amendment to the original petition, this defendant says that heretofore, to wit, at the June term, A. D. 1877, of the district court of Galveston county, in this suit, No. 6677, then pending, wherein the said James C. Wootters and
113 William P. Hayes were plaintiffs and Julius Kauffman, deceased, and Duble and Wootters, defendants, and for the same cause of action in said petition mentioned, and the same having been tried before a jury, who rendered their verdict therein in favor of said defendant, Kauffman, deceased, and thereupon the court rendered judgment for the defendant, J. Kauffman, deceased, "that he go hence without day, and that he recover of the plaintiff his costs in this behalf expended," as by the record and proceedings more fully appears; which said judgment still remains in full force and effect and in nowise reversed, satisfied, or made void; and this this defendant is ready to verify by the record. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, &c.

WAUL & WALKER,
Att'ys for Julius Kauffman, Defendant.

Filed June 6, 1885.

ALEX. EASTON,
Clerk D. C. G. Co.,
By EDWIN BRUCE, *Deputy.*

Plaintiff then offered the following citation to Clara Kauffman, issued May 1st, 1884.

Citation.

No. 6677.

The State of Texas to the sheriff or any constable of Galveston county, Greeting:

114 Oath therefor having been made as required by law, you are hereby commanded that, by making publication of this citation in some newspaper published in said county once a week for four consecutive weeks previous to the return day hereof, you summon Clara Kauffman, defendant, to be and appear before the district court, to be holden in and for the aforesaid county of Galveston, at the courthouse thereof, in the city of Galveston, on the first Monday in June, 1884, then and there to answer the first amended original petition of James C. Wootters, plaintiff, filed in said court on the 25th day of January, 1884 (the original petition filed April 2, 1874), and numbered on the docket of said court 6677, against the said Clara Kauffman, Julius Kauffman, John H. Wootters, and Henry N. Duble and alleging in substance as follows: That at divers stated times between September 1, 1873, and March 1, 1874, Julius Kauffman, dec'd, the husband of said Clara Kauffman and father of said Julius Kauffman, and said John H. Wootters and Henry N. Duble unlawfully took and converted to their own use one hundred and thirty-five bales of cotton, the property of James C. Wootters & Co., of the value of $10,800.00; that said plaintiff has acquired by purchase the right of action of said James C. Wootters & Co. against said defendants in this behalf; that said Julius Kauffman, dec'd, has died since the institution of this suit, and that said Clara Kauffman is the widow and said Julius Kauffman is the son of said Julius Kauffman,
115 deceased, and have each received and have by devise and gift as volunteers property and assets of the estate of said decedent exceeding in value the amount sued for in this action; that plaintiff has been damaged in the sum of $25,000.00, and asks judgment against defendants for said cotton or the value thereof, with his damages, and that said Clara Kauffman and Julius Kauffman be made defendants in said suit and be cited to answer according to law.

Herein fail not, but have you then and there before said court this writ, with your return thereon showing how you have executed the same.

Issued this the 1st day of May, A. D. 1884.

Witness Alex. Easton, clerk of the district court of Galveston county.

Given under my hand and the seal of said court, at office, this the 1st day of May, A. D. 1884.

Attest:

[SEAL.]

ALEX. EASTON,
Clerk of District Court of Galveston County.

A true copy I certify.

WM. P. OWENS,
Sheriff, Galveston County.

(Endorsed on the back:) No. 6677. In district court. James C. Wootters *et al. vs.* Julius Kauffman *et als.* Citation by publi-
116 cation. Issued this 1st day of May, A. D. 1884. Alex. Easton, clerk D. C. G. Co.

Sheriff's Return.

Received this writ on the 1st day of May, A. D. 1884, at 10 o'clock a. m. of said day, and I executed the same by publishing the same in the Sunday Opera Glass, a newspaper published in the county of Galveston, once in each week for four consecutive weeks previous to the return day thereof. Said publication was made on the 4th, 11th, 18th, and 25th days of May, A. D. 1884, and a printed copy thereof herewith accompanies this return.

Witness my hand officially.

WM. P. OWENS,
Sheriff of Galveston County,
By GEO. J. TOWNSEND, *Deputy.*

Affidavit of Publication.

STATE OF TEXAS, }
County of Galveston. }

Personally appeared before me F. R. Sharp, agent "Opera Glass," a newspaper published in the city of Galveston, Texas, who, being duly sworn, declares that the annexed copy of citation in case 6677, James C. Wootters *et al. vs.* Julius Kauffman *et al.*, was duly published in said newspaper for four consecutive weeks prior to the return day thereof, the publication days being May 4th, 11, 18, and
25, 1884.
117 F. R. SHARP.

Sworn to and subscribed before me this 26th day of July, 1884.

ALEX. EASTON,
Clerk D. C. G. Co.

Plaintiff then offered the following motion to quash by Mrs. Clara Kauffman:

Motion to Quash Citation.

JAMES C. WOOTTERS *et al.*
vs.
JOHN H. WOOTTERS, CLARA KAUFFMAN, *et al.* } No. 6677.

And the said defendant, Clara Kauffman, who makes her appearance by her attorneys for this purpose only, and moves the court to

quash the service of the citation by publication filed in this cause, because the same was pretended to be served by publication made in a newspaper published weekly, on Sunday, called the Sunday Opera Glass, in the city and county of Galveston, and the said publication was made therein on Sunday, the 4th of May, 1884; on Sunday, the 11th of May, 1884; on Sunday, the 18th of May, 1884, and on Sunday, the 25th of May, 1884, and on no other days and in no other newspaper, this suit not being a suit for attachment, injunction, or sequestration.

Wherefore she prays that the said citation be quashed.

WAUL & WALKER,
118 *Att'ys Appearing for Mrs Clara Kauffman.*

Filed June 6th, 1885.

ALEX. EASTON,
Clerk D. C. G. Co.

Plaintiff then offered the following judgment, as follows:

Order of Court Sustaining Motion to Quash and Sustaining Demurrers & Exceptions of Julius Kauffman, etc.

MONDAY, *June 8th, A. D.* 1885.

Court met pursuant to adjournment.

J. C. WOOTTERS & Co. } No. 6677.
vs.
J. KAUFFMAN *et al.*

This day came on to be heard the motion of the defendant to quash the service herein on Clara Kauffman; which said motion being duly considered by the court, it is ordered that the service made on the defendant Clara Kauffman be, and the same is hereby, quashed. The opinion of the court being that the petition discloses no cause of action against Julius Kauffman, his demurrer and exceptions are sustained; to which ruling of the court the plaintiff excepts. Plaintiff has leave to file an amended original peti-
119 tion in lieu of all former pleadings, and cause continued.

Plea of Mrs. Clara Kauffman to the Jurisdiction.

J. C. WOOTTERS *et al.* } No. 6677.
vs.
JULIUS KAUFFMAN *et al.*

And this defendant, Clara Kauffman, to the 2nd amended petition, says that this court has no jurisdiction over her person, for this: That no proper service of citation has been made on her by publication or in any other manner; that said pretended service made by publication in the "Sunday Opera Glass" was null and void, because she says the said newspaper is a weekly newspaper pub-

lished in the city of Galveston and on no other day than excepting Sunday, and that said publication was made on Sunday, May 4th, 1884; on Sunday, May 11, 1884; on Sunday, May 18th, 1884, and on Sunday, May 25th, 1884, and on no other days, and that it is forbidden by law that any process shall be served on Sunday except in case of injunction, attachment, or sequestration, and that this suit is not a case of injunction, attachment, or sequestration, which she is ready to verify. Wherefore she prays judgment whether this court can or will take further cognizance of this suit against her.

WAUL & WALKER,
Att'ys for Clara Kauffman, Defendant.

120 Filed October 13th, 1885.

ALEX. EASTON,
Clerk D. C. G. Co.,
By EDWIN BRUCE, *Deputy.*

Plaintiff then offered in evidence the following demurrer and answer of Clara Kauffman, filed October 13th, 1885, as follows:

Demurrer and Answer of Clara Kauffman. Filed Oct. 13, 1885.

JAMES C. WOOTTERS *et al.*
vs.
JULIUS KAUFFMAN *et al.*
} No. 6677.

And this defendant, Clara Kauffman, reserving all exceptions to the ruling of the court on defendant's plea to the jurisdiction to plaintiff's 2nd amended original petition, says that the matters and things therein set forth are not sufficient in law for the plaintiff to have and recover of this defendant, and for special cause of exception says that it appears by said petition that at the June term, 1877, of this honorable court a regular trial was had and a verdict found by the jury in favor of the defendant Kauffman, deceased, and that a valid judgment was thereupon rendered in favor of said Julius Kauffman, deceased, which still remains in full force and effect and in nowise reversed or made void; 2nd, that no
121 writ of *scire facias* or other process has been asked for by plaintiffs against the executors of the estate of Julius Kauffman, deceased, during the time said estate was in their possession nor any sufficient reason given why the same has not been done; 3rd, that said petition is otherwise informal and defective.

WAUL & WALKER,
Att'ys for Def't Clara Kauffman.

And should said exceptions be overruled defendant, further answering, says that at the June term of A. D. 1877 of the district court of Galveston county, in this suit, then pending, wherein the said James C. Wootters *were* plaintiffs and the said Julius Kauffman and Duble and Wootters, defendants, and for the same cause of action in said petition mentioned, and the same having been

tried before a jury, who rendered their verdict therein in favor of said defendant, Julius Kauffman, deceased, and thereupon the court rendered judgment for the said Kauffman "that he go hence without day, and that he recover of the plaintiff his costs in this behalf expended," as by the record and proceedings more fully appears; which said judgment still remains in full force and effect and in nowise reversed, satisfied, or made void; and this defendant is ready to verify by the record. Wherefore she prays judgment.

And for further answer defendant says that the cause of
122 action, if any cause of action has accrued, accrued more than two years before the plaintiffs have filed their petition against her, and, further, that said cause of action accrued more than four years before the filing said petition. Wherefore defendant prays judgment.

WAUL & WALKER,
Att'ys for Defendant Clara Kauffman.

Filed October 13th, 1885.

ALEX. EASTON,
Clerk D. C. G. Co.,
By EDWIN BRUCE, *Deputy.*

Testimony of Julius Runge.

JULIUS RUNGE, witness for plaintiff:

Was a clerk in the employ of Kauffman & Runge during 1873, and was attending to the foreign correspondence. Julius Kauffman, dec'd, was then the only member of and composed the firm of Kauffman & Runge. He is now dead. He died January 17th, 1880. August Buttlar, E. T. Austin, and himself (the witness) were the executors of his last will, and filed in this county an inventory and appraisement of his estate. Mr. Kauffman died in Bremen, Germany. The executors turned over all his property to Mrs. Clara Kauffman, as directed by the will. The inventory and appraisement of the estate filed by them are correct. Mrs. Kauff-
123 man was the wife of Julius Kauffman, deceased, and the mother of Julius Kauffman, who, with herself, are defendants in this suit.

I know Mr. Kauffman, Jr., received money by gift from his mother in the summer of 1880. It approximated $250,000.00, and was a transfer of an equivalent in cash on our books, to wit, of firm of Kauffman & Runge, as it then was. It was not a transfer of her interest in the firm of Kauffman & Runge. Her interest had been liquidated. Mrs. Kauffman gave her son a certain amount of money transferred on our books. What he got was less that his mother's share in the estate. Mrs. Kauffman had an amount of money to her credit with the house, and she directed that that be transferred to her son; amount was $250,000.00. The amount of Julius Kauffman's interest in the firm of Kauffman & Runge acquired by gift from his mother is largely in excess of the amount involved in this

suit. His mother acquired the same by last will of her husband. The firm of Kauffman & Runge was originally composed of Julius Kauffman and Henry Runge, both now deceased. It was formed in 1872, and was dissolved by the death of Henry Runge, in March, 1873. The firm name was continued by Julius Kauffman alone until the 1st of April, 1874, when I became a member of the firm, and I continued a member of the firm until January 17th, 1880, when, by the death of Mr. Kauffman, I was the sole surviving member, and so continued until July, 1880, when Julius Kauffman, Jr., be-
124 came a partner. Mrs. Clara Kauffman was with her husband in Bremen, Germany, at the time of his death, and has only visited Texas once since then, and then for a few months in 1884.

Julius Kauffman, Jr., was in Galveston at the time of his father's death, and a few days after he received notice of his father's death he went to Germany, and returned in October, 1880. He left here in March, 1887—beginning of March—and did not return until about the last of October. When he left here he went to Europe. He did not go to Europe in 1886. He remained here from 1880 to 1884, for three or four years. He left here in the beginning or middle of April and came back some time in October—sometimes in the latter part and sometimes in the middle of the month, with the exception of 1884, when he spent all the summer here.

(When witness refers to Julius Kauffman going away he means that he went away from the United States to visit his mother in Germany.)

States that the cotton in controversy was shipped abroad for sale by Kauffman & Runge, as was all the cotton obtained that season from Duble & Wootters.

(The inventory filed by executors of estate of Kauffman, deceased, embraces only his estate in Texas.)

On cross-examination:

States that 60 bales of the cotton obtained from Duble & Wootters averaged $462\frac{7}{10}$ lbs. each; net lot 99 bales averaged $486\frac{9}{16}$ lbs.
125 each; net lot 50 bales averaged $485\frac{24}{100}$ lbs. each; net lot 86 bales averaged $490\frac{53}{100}$ lbs. each. The house of Kauffman & Runge advanced on said cotton $40.00 or $50.00 per bale (forty or fifty dollars). The property was transferred to Clara Kauffman on the 12th of January, 1881. The property given by Mrs. Kauffman to Julius Kauffman was given on the 1st of July, 1880. It was her own property she was giving; does not know what was Mrs. Kauffman's share in the estate. The estate in Texas alone was known by him. Mrs. Clara Kauffman gave Julius Kauffman an order for the $250,000.00, which we placed to his credit as cash, and we placed the amount to her individual indebtedness on our books. None of the cotton received from Duble & Wootters was on hand as late as February, 1874.

Redirect examination:

Stated that the average weights of the cotton testified to was upon 295 bales, which included the 135 bales claimed by plaintiff; that on a former trial he stated that Mrs. Kauffman had an amount of money to her credit with the house amounting to $250,000.00, which she directed to be transferred to her son. To the question of plaintiff:

Q. Then the property transferred to Mr. Julius Kauffman by his mother was property she received from the estate of her deceased husband by virtue of the will he made?

126 A. That may be a correct construction. It is a matter I know nothing about. We made a transfer. We made no cash transfer. This transfer was made by Mrs. Kauffman before we transferred the property, and she had a credit with us before. This is my answer made before, and is the correct answer, and the transfer was made to her son on account of her own credit with the house.

On re-examination by plaintiff:

Witness stated Mrs. Clara Kauffman had no credit in the house except what she derived from her husband's will. The cotton sued for was all shipped to Melly, Forget & Co., Liverpool, for account of Duble & Wootters. Kauffman & Runge made advances on the cotton. It was not an absolute sale. The money advanced by Kauffman & Runge was repaid by Melly, Forshet & Co.

Referring to witness' statement that in July, 1880, Kauffman & Runge, by Mrs. Kauffman's order, had transferred to her son two hundred and fifty thousand dollars ($250,000.00) she then had to her credit on their books, plaintiff asked witness: "Did she have any credit in that house except what she derived from her husband's estate?" to which witness answered: "No, sir."

Testimony of W. L. Moody, W. K. McAlpine, — J. D. Skinner.

127 W. L. Moody, W. K. McAlpine, and J. D. Skinner, witnesses for plaintiff, testified—

That they were factors and commission merchants in Galveston from 1866 or 1867 until the present time; that they were acquainted with the custom and usage of factors concerning cotton shipped to them; that they were members of the Galveston Cotton Exchange from its organization, in 1871; had all been directors and officers therein.

That cotton was generally sent to the factors for sale in this market; was so sold. It was the usage, and it was generally understood that when no special instructions were given the cotton was to be sold in this market for account of the owners, and cannot remember any instance in which cotton was shipped to foreign markets for sale without special instructions.

It is admitted by counsel for defendants that the 135 bales of cotton sued for, with the marks, brands, and numbers as described in plaintiff's petition, were received by Julius Kauffman, deceased,

doing business under the style of Kauffman & Runge, and on the several days there in said petition stated from the said Duble & Wootters.

128 Plaintiff then offered in evidence the following list, which is admitted to be correct by the defendants, and showing the value of the cotton on the several dates therein named:

Statement of Prices of Cotton Furnished by A. G. Mills, Secretary of the Galveston Cotton Exchange.

Date.	Grade.	Value.
November 3, 1873	Good ordinary	12 7/8
" 5, "	"	12 3/4
" 6, "	"	12 3/8
" 8, "	"	12 1/4
" 20, "	"	13 1/4
" 21, "	"	13 1/2
" 22, "	"	13 5/8
" 24, "	"	13 5/8
Dec'r 1, "	"	14 1/4
" 3, "	"	13 7/8
" 17, "	"	14 1/2
" 18, "	"	14 1/4
" 20, "	"	13 3/4
" 22, "	"	13 5/8
" 24, "	"	13 3/4
" 29, "	"	13 7/8
" 31, "	"	13 5/8

129 The defendants offered in evidence the records of the court from 1877 to June 20th, 1884, by which it appears that the first order giving plaintiff leave to amend was made on the 20th of June, 1884, and is in the following words: "Plaintiff has leave to file amended original petition in lieu of amended original petition filed — day of ——, and cause continued to make parties." To which testimony plaintiff objected, and the objection was overruled by the court; to which plaintiff excepts.

It was admitted by plaintiffs that the records of the court from 1877 to 1884 will not show that any leave was obtained to amend the pleadings from 1877 to 1884, when the order was made as offered in evidence by defendants.

The defendants then offered in evidence plaintiff's 1st amended original petition, as set forth heretofore; also the demurrer and answer to the same, filed by Julius Kauffman on June 6th, 1885, and also the motion to quash, made by defendant Mrs. Clara Kauffman to quash the citation and the judgment of the court thereon, as ap-

pears heretofore in this statement of facts and in the bills of exceptions of defendants herein.

Defendants also offered defendant Clara Kauffman's plea to
130 the jurisdiction, filed October 13th, 1885, as taken from the records of the court and heretofore incorporated in this statement of facts and defendants' bill of exceptions No. 1.

The foregoing statement of facts, having been agreed to by counsel, is submitted by counsel for the parties, plaintiffs and defendants.

WAUL & WALKER,
Counsel for Defendants Julius Kauffman and Clara Kauffman.
GEO. MASON AND
D. A. NUNN,
Counsel for Pl't'ff J. C. Wootters.

I hereby certify that the attorneys of the respective parties signed the foregoing statement of facts in above-styled cause and presented same to me for my approval, and I approve the same and order it to be filed and constitute part of the record of the cause.
Nov. 29th, 1889.

WM. H. STEWART,
Judge of 10th Judicial District.

Filed November 29th, 1889.

ALEX. EASTON,
Clerk D. C., G. Co.,
By EDWIN BRUCE, *Deputy.*

131 *Appeal Bond. Filed Dec.* 18, 1889.

THE STATE OF TEXAS, }
County of Galveston. }

JAMES C. WOOTTERS
vs.
CLARA KAUFFMAN and JULIUS KAUFFMAN and JNO. H. WOOTTERS. } No. 6677.

Whereas, in the above numbered and entitled cause, pending in the district court of Galveston county, and at a regular term of said court, to wit, on the 17th day of October, A. D. 1889, the said James C. Wootters recovered judgment against the said Clara Kauffman and the said Julius Kauffman for the sum of twenty thousand one hundred and thirty-five dollars and sixty-four cents ($20,135.64), with interest, at the rate of 8 per cent. per annum, from the said 17th day of October, 1889, and all costs of suit, from which judgment the said Clara Kauffman and the said Julius Kauffman have taken an appeal to our supreme court and desire to *expend* the execution of said judgment during the pendency of said appeal:

Now, therefore, we, Clara Kauffman and Julius Kauffman, as principals, and Wm. H. Sinclair, I. Heidenheimer, and Leon Blum,

as sureties, acknowledge ourselves bound to pay the said James C. Wootters forty-one thousand dollars, conditioned that the said Clara Kauffman and the said Julius Kauffman shall prosecute their appeal with effect, and, in case the judgment of the appellate court
132 shall be against them, that they shall perform its judgment, sentence, or decree and pay all such damages as said court may award against them.

Witness our hands this 18th day of December, A. D. 1889.

MRS. CLARA KAUFFMAN,
By F. HUBER, *Her Attorney-in-Fact.*
JULIUS KAUFFMAN.
WM. H. SINCLAIR.
I. HEIDENHEIMER.
LEON BLUM.

Approved December 18th, 1889.
ALEX. EASTON,
Clerk D. C., G. Co.

Filed December 18th, 1889.
ALEX. EASTON,
Clerk D. C., G. Co.

Assignment of Errors. Filed January 9, 1890.

District Court, Galveston County.

JAMES C. WOOTTERS *et al.*
vs.
JULIUS KAUFFMAN *et al.* } No. 6677.

And the defendants, Clara Kauffman and Julius Kauffman, assign the following errors in the above-stated case:

133 I. That the judge erred in ruling out the testimony offered by defendants to support their plea of former judgment as "*res judicata*," consisting of the verdict of the jury, the judgment of the court, and the motion for new trial and the judgment of the court overruling the same, as shown by the records of the district court of said county, at the June term, 1877, and particularly set forth in their bill of exceptions No. 2, filed in the cause.

II. That the judge erred in so much of his charge to the jury as incorporated therein the pretended substance of the petition, viz: The first amended petition filed by plaintiffs on the 25th of January, 1884, the same having been filed without leave of court, and the judge having at a former term, to wit, at the June term, 1885, sustained the demurrer of Julius Kauffman to said petition as follows: "The opinion of the court being that the petition discloses no cause of action against Julius Kauffman, his demurrer and exceptions are sustained," and that afterwards the plaintiff, on the 5th of October, 1885, filed his 2nd amended original petition in lieu of and in substitution for his amended original petition, filed January 25th, 1884, and all other pleadings theretofore filed by him.

III. That the court erred in his charge to the jury, without qualification, that "The property of a deceased person is liable for the payment of his debts to the extent of the value of the prop-
134 erty so received of the estate."

IV. And the said Julius Kauffman assigns as error that the judge instructed the jury upon his plea of the statute of limitations, viz: "And in order to determine the question of limitation of two years as to the son, Julius Kauffman, the times of his absence from this State must not be counted in his favor but must be deducted from the time which elapsed between his reception of his father's property and the 25th of January, 1884, in order to ascertain whether or not the bar of two years has been completed in his favor," the court thus assuming that Julius Kauffman had received his father's property and that the statute of limitations ceased running on the 25th of January, 1884, when, by the ruling of the judge, no cause of action was in the petition then filed and when said petition had been abandoned by plaintiff.

V. That the court erred and charged on the weight of evidence in assuming that the property or credits received from his mother by Julius Kauffman was the property of his deceased father, the testimony showing that the gift from his mother was of her own property and donated to her son before she had received any part of the estate of her deceased husband.

VI. That the court erred in its order made on the 13th of
135 October, 1885, as follows: "And the plea as to service by publication on the defendant Mrs. Clara Kauffman was acted upon at the last term of court and the service, on motion of her attorney, was quashed, as the publication was made on four consecutive Sundays; and now the defendant renews her said plea to the jurisdiction and claims she is not subject to the jurisdiction of the court, in that no other service than said publication was ever made on her, and it being the opinion of the court that, said service having on her motion been quashed at the last term, she is now by virtue of the spirit of the statute legally in court at the present term, the same as if there had been personal service on her, and to this ruling she excepts." And the court erred in its judgment, entered on the 14th of October, 1889, in overruling defendant Clara Kauffman's plea to the jurisdiction of the court, filed October the 12th, 1889, as the pleading and testimony in the cause shows that said Clara Kauffman long before, at the time, and since the institution of this suit, until the said trial of said cause on the 14th of October, 1889, was a non-resident of the State of Texas and was a resident of the Empire of Germany; that she never appeared personally nor received service of citation or authorized any one to receive service for her, nor did she waive service of citation or authorize any one to waive service of citation or notice of the institution of this suit
136 for her, nor did she authorize any person to appear for her, except to object specially to the jurisdiction of this court, as is shown by the record in the cause; and that the court erred in assuming jurisdiction of the case over her person, who, through her attorneys, was protesting against the court's so taking jurisdiction,

and that the said several rulings of the court are in violation of the Constitution of the United States, said jurisdiction being assumed and taken without "due process of law" and in violation of the law of the land, no service being made on her personally or otherwise and no voluntary appearance being made by her in said suit.

VII. Because the court erred in overruling defendant Julius Kauffman's demurrers to plaintiffs' 2nd amended petition, filed October 5th, 1885; the said petition showing no cause of action against said defendant that as heir, legatee, or representative of said Julius Kauffman, deceased, or to show any right the plaintiff has to make said Julius Kauffman a party to this suit.

VIII. Because the jury found contrary to the evidence, in this: I. That the evidence shows that the credit received from his mother on the books of Kauffman & Runge was a credit that the mother had individually with the house and was not money received from the estate of her husband, Julius Kauffman, Sr, deceased.

IX. Because the jury found contrary to the evidence on
137 the plea of the statute of limitations of two years made by defendant Julius Kauffman, in calculating from July the 1st, 1880, to January 25th, 1884, instead of from 1st July, 1880, to October 5th, 1885, the first day under the decision of the judge that there was any cause of action against Julius Kauffman.

X. Because the verdict of the jury was against the evidence.

XI. Because the judge overruled the motion for new trial made by the defendants, Julius Kauffman and Clara Kauffman.

WAUL & WALKER,
Att'ys for Clara Kauffman and Julius Kauffman.

Filed January 9th, 1889.

ALEX. EASTON,
Cl'k D. C., G. Co.

Bill of Costs.

Clerk's fees:

Docketing suit	
Issuing citations, 4	3 00
Copying petition	11 85
Entering appearance	45
Entering continuance	5 40
138 Docketing motion or rule	1 05
Entering orders	11 00
Affidavit, with certificate and seal	50
Subpœnas, witnesses	3 70
Swearing witnesses	3 00
Copy interrogatories and precept	10 75
Swearing and empaneling jury, 3	13 50
Receiving and recording verdict, 3	1 05
Entering interlocutory judgment	1 05
Entering final judgment, 3	4 00
Taking bond, 4	6 00
Taxing costs and copy	25

Execution and return	1 50
3 transcripts	283 00
Filing and certifying 3 briefs	2 70
Copy cotton report	5 00
Jury tax	5 00
Sten'g'r fees	121 70
	495 45

Sheriff's fees:

Serving citation, 2	3 00
" notice to take depositions	1 00
Levying and returning execution	1 00
Jury fee, 3	1 50
Summoning witnesses	9 50
	$511 45
139 Def'ts' wit. fees	8 00
	519 45
Cr. cash paid by def'ts	208 70
Due	$310 75

THE STATE OF TEXAS, }
County of Galveston. }

I, Alex. Easton, clerk of the district court of Galveston county, do hereby certify that this is a correct bill of costs as taxed against the defendants in cause No. 6677, James C. Wootters *vs.* Julius Kauffman *et al.*, in said court.

ALEX. EASTON,
Clerk District Court.

Certificate of Clerk.

THE STATE OF TEXAS, }
County of Galveston. }

I, Alex. Easton, clerk of the district court in and for the county of Galveston, State of Texas, do hereby certify that the foregoing 129 pages contain a true and correct transcript of all the proceedings had in said court in cause numbered 6677 and entitled James C. Wootters, plaintiff, *vs.* Julius Kauffman *et al.*, defendants,
140 as all the same appears on file and of record in my office.

Witness Alex. Easton, clerk of the district court of Galveston county.

Given under my hand and official seal, at Galveston, on this 10th day of January, A. D. 1890.

[SEAL.] ALEX. EASTON,
Clerk of the District Court of Galveston County.

141 JULIUS KAUFFMAN *et al.* *vs.* J. C. WOOTERS. } No. 2844. 3rd Ass't.

Appeal from Galveston county.

This action was brought against Julius Kauffman, Sr., on April 2, 1874, to recover the value of cotton hypothecated with him by Duble & Wooters to secure a loan.

The cotton belonged to J. C. Wooters & Co., but was shipped abroad and sold by Kauffman, then doing business in the name of Kauffman & Runge, this being done under authority from Duble & Wooters, to whom the cotton had been consigned by J. C. Wooters & Co., for the purpose of sale in this market.

The action pending on January 17, 1880, Julius Kauffman, Sr., died testate, and by the terms of his will all of his estate, wheresoever situated, passed to Mrs. Clara Kauffman, his widow.

On January 25, 1884, a petition was filed in the cause making Mrs. Kauffman and Julius Kauffman, the only child of herself and Julius Kauffman, Sr., parties defendant. That petition was amended on Oct. 5, 1885, but the averments of the two petitions are substantially the same, in so far as they state facts to show the liability of Mrs. Kauffman and her son Julius.

That amendment alleges that "Clara Kauffman is the widow and sole devisee and legatee of said Julius Kauffman, deceased,
142 and is in the possession, use, and enjoyment of a large amount of property of the estate of her said deceased husband, not exempt from the payment of his debts, devised and bequeathed to her by his last will and testament, and of the proceeds of such property so devised and bequeathed to her; and that the said defendant, Julius Kauffman, is the son of the said Julius Kauffman, deceased, and of the said Clara Kauffman, and is in the possession, use, and enjoyment of a large amount of property of the estate of his said deceased father not exempt as aforesaid, heretofore given to him by his said mother, and of the proceeds of such property so given to him as aforesaid."

The petition made a copy of the will of Julius Kauffman, Sr., an exhibit.

The petition then alleged that the will appointed three persons, named the executors of the will in Texas, and that Mrs. Kauffman was made executrix of the will in Germany, the testator having estate in both countries; that the will provided no action should be had in the courts other than the probate of the will and return of an inventory, the executors not to be required to give bond; that the will was probated and the appointment of executors confirmed; that the executors named qualified, took possession of the estate, and returned an inventory which was made an exhibit, and showed an estate in Texas consisting of property, real and personal, amounting in value to $396,392.00.

The will provided that Mrs. Kauffman, by power of at-
143 torney, might take the estate out of the hands of the three Texas executors if she saw proper to do so, or might take

charge of it herself; that in Sept., 1880, she availed herself of this right, and by her power of attorney "did transfer, make over, and assign and request * * * Texas executors as aforesaid to transfer and assign to said defendant, Julius Kauffman, all the real and personal estate and choses in action which by said will she might be authorized to do, and made and appointed said defendant, Julius Kauffman, her agent and attorney, to act for her and in her name, place, and stead in all matters of the estate of said Julius Kauffman, deceased, with power to sell and convey all her interest therein, with full power of substitution, * * * and that thereby said Clara Kauffman took said estate and the administration thereof out of the hands of said * * * executors as aforesaid, and vested the same and the management and control thereof in the said defendant, Julius Kauffman," whereupon the executors resigned and relinquished "unto the said Clara Kauffman and said defendant, Julius Kaffman, all their rights as executors in said estate," and notified all persons thereof, "and that there has not since been any legal representation of said estate, but that the same, in the manner aforesaid, passed into the hands, possession, and control of said Clara Kauffman, who, as sole devisee thereof, received and took the same in charge with and liable, subject to the debts of said Julius
144 Kauffman, deceased; that the estate * * * in Texas, not exempt by law from forced sale or for the payment of debts, so received and taken by her greatly exceeded in value all claims against said estate, including the amount sued for herein, and was and is assets in her hands charged with and liable and subject to payment of said debts."

"And plaintiff further says that after the said Clara Kauffman had so received and taken said estate and property and the title, possession, and control thereof, as aforesaid, and while the same was so charged, liable, and subject as aforesaid, she conveyed, transferred, assigned, and delivered, without any valuable consideration therefor, a large portion thereof, situated in said State of Texas, greatly exceeding in value the amount sued for herein, to the said Julius Kauffman, who took and received the same from her charged with and liable and subject to the payment of said debts of said Julius Kauffman, deceased, * * * well knowing the same to be so charged, liable, and subject; and said plaintiff charges that said defendants, Clara Kauffman and Julius Kauffman, in manner and form as aforesaid, have confederated together with intent to obstruct, hinder, and delay the said plaintiff as a creditor of said Julius Kauffman, deceased, in the collection of his just claim against said estate."

There was prayer for judgment against both defendants for the cotton or its value, and a judgment was rendered against them for $20,135.64 No question is raised on this appeal as to the
145 sufficiency of the evidence to show that Julius Kauffman, Sr., was liable for the value of the cotton, nor can there be any question of the sufficiency of the pleadings and evidence to justify a judgment against Mrs. Kauffman. That the court had acquired jurisdiction as to her was held on a former appeal.

Mrs. Kauffman received the estate of her husband liable to the payment of his debts in her hands just as it had been in his but creditors had no lien upon it. S. C. S., 1817; Mayes *v.* Jones, 62 Tex., 365; Webster *v.* Willis, 56 Tex., 684. Persons having claims against an estate administered under a will without the probate court, by executor not required to give bond, may require those interested in an estate as devisees, legatees, or heirs to give bond as required by statute, on which suit to recover sum due may be maintained, and in default of such a bond may force an administration. S. C. S., 1949-1952.

This remedy, however, is not exclusive, and by reception of the estate Mrs. Kauffman became as much liable for debts to the extent of value of debt-paying assets of the estate received as she and bondsmen would have been had she executed bond, the sole purpose of which is security to creditors.

She becomes liable because as devisee and legatee she received property liable to payment of debts.

Julius Kauffman filed a general demurrer to the petition, and further questioned its sufficiency on the ground that it did
146 not aver that he as heir, devisee, or legatee had received any part of the estate of his father, or that in either of those characters he held possession of any part of the estate.

The demurrers were overruled.

It is very clear that the petition does not aver that as heir, devisee, or legatee he received any part of the estate of his deceased father. On the contrary, it avers that Mrs. Kauffman was sole devisee and legatee, and a copy of the will was made an exhibit, which shows that the averment was true.

The averment is that he received as a gift from his mother "a large amount of property of the estate of his deceased father" not exempt from sale for payment of debts, and that "she conveyed, transferred, assigned, and delivered, without any valuable consideration therefor, a large portion thereof situated in said State of Texas, greatly exceeding in value the amount sued for herein, to the said defendant, Julius Kauffman, who took and received the same from her charged with and liable and subject to the payment of said debts of said Julius Kauffman, deceased, well knowing," &c.

There is no averment that he agreed to pay debts in consideration of the conveyance to him, and when it is said that he received property charged with payment of debts we are to understand the pleader to mean that property received by him as a gift from his mother fixed upon him the same liability that would have
147 existed had he received the same property as devisee, legatee, or heir. The demurrer filed by Julius Kauffman questioning the correctness of this proposition was overruled, and the charge of the court in effect informed the jury that he was liable to appellee if he received property from his mother, which came to her through the will of his father, in value equal to sum due appellee. If this be not the law the judgment must be reversed as to Julius Kauffman.

When Mrs. Kauffman received the estate of her husband she made

herself liable for debts of the estate to the extent of assets, subject to payment of debts, received by her. To that extent she became a debtor and the property in her hands liable to sale for payment as was it in the hands of her husband.

Her dominion over that property after the executors resigned was as complete as was that of her husband during his life.

She could sell it, and title would pass free from the claim of creditors.

She could give it away, subject only to the restriction that thereby creditors to whom she had become responsible were not defrauded. Any disposition she might make of it would be valid if the same disposition would have been valid if made by her husband. If the gifts made to Julius Kauffman by his mother would not have been fraudulent as to creditors had they been made by the father,
148 then they were not fraudulent when made by the mother. It is not unlawful for a parent to make a gift to a child, and no creditor has right to complain that this is done if the parent retains ample property to satisfy the claims of all creditors.

Plaintiff alleges that Mrs. Kauffman received under the will of her husband an estate situated in this State aggregating in value $396,392.00, exclusive of some accumulation of interest on notes, bonds, and like interest-bearing securities; but his petition may be searched throughout and no averment will be found that of this a sum much larger than necessary to meet all claims against the estate did not remain in her hands after the gift to her son. The amount of the gift to him was not alleged, but it was said to be largely more than the sum due to plaintiff, which is less than $21,000.

If Julius Kauffman is liable to plaintiff at all it is not because he has received a part of the estate from his mother by way of gift, but because he received so much of the estate through a voluntary conveyance that there was not ample left in the hands of his mother to meet the claims of creditors.

The law does not presume that such a state of facts existed, and a petition seeking to show that Julius Kauffman was liable to appellee for the debt of his father which did not state facts showing that the gift from his mother to him was fraudulent as to creditors was insufficient on general demurrer.

149 The only fair inference from the facts stated in the petition is that Mrs. Kauffman retained of the estate in Texas more than sufficient to meet all debts. No claim against the estate other than that sued on is shown to have existed. There seems to have been an estate in Germany as well as in Texas.

He was not liable as he would have been had he received the property as heir, devisee, or legatee, and when it was shown by the petition that he did not so receive it it was incumbent on appellee to allege the facts that would render him liable.

The general demurrer filed by Julius Kauffman, as well as demurrer numbered "1," should have been sustained to so much of the petition as sought to hold him liable, and the charge of the court which assumed that he would be liable if he received property formerly belonging to his father's estate, though not as heir, devisee, or

legatee, without reference to any other fact than the value of the property so received, was erroneous.

It is urged that the court erred in assuming in charge that property received by Julius Kauffman from his mother was a part of the estate she received through the will of his father.

We think there was no error in this, for he stated that he had indirectly received property from the estate in value greater than sum claimed by appellee, and Mr. Runge, who was a partner
150 of Julius Kauffman, Sr., at the time of his death and one of the executors, testified as follows: "I know Mr. Kauffman, Jr., received money by gift from his mother in the summer of 1880. It approximated $250,000, and was a transfer of an equivalent in cash on our books, to wit, of firm of Kauffman & Runge, as it then was. It was not a transfer of her interest in the firm of Kauffman & Runge. Her interest had been liquidated. Mrs. Kauffman gave her son a certain amount of money, transferred on our books. What he got was less than his mother's share in the estate. Mrs. Kauffman had an amount of money to her credit with the house and she directed that that be transferred to her son. Amount was $250,600. The amount of Julius Kauffman's interest in the firm of Kauffman & Runge, acquired by gift from his mother, is largely in excess of the amount involved in this suit. His mother acquired the same by last will of her husband.

The property was transferred to Clara Kauffman on the 12th January, 1881. The property given by Mrs. Kauffman to Julius Kauffman was given on the 1st of July, 1880. It was her own property she was giving; does not know what was Mrs. Kauffman's share in the estate. The estate in Texas alone was known by him. Mrs. Clara Kauffman gave Julius Kauffman an order for the $250,000, which we placed to his credit as cash, and we placed the amount of her individual indebtedness on our books.

Q. Then the property transferred to Mr. Julius Kauffman by his mother was property she received from the estate of her deceased husband by virtue of the will he made?

151 A. That may be a correct construction. This transfer was made by Mrs. Kauffman before we transferred the property, and she had a credit with us before. This is my answer made before and is the correct answer, and the transfer was made to her son on account of her own credit with the house.

On re-examination witness stated Mrs. Clara Kauffman had no credit in the house except what she derived from her husband's will.

To the question: Did she have any credit in that house, except what she derived from her husband's estate? To which witness answered: No, sir.

This was the evidence on that question and clearly shows that the gift here spoken of came from property Mrs. Kauffman received through her husband's will.

This evidence, however, was not sufficient to authorize a recovery against him under the facts alleged by appellee. The amended petition filed on January 25, 1884, by which Mrs. Kauffman and

Julius Kauffman were made parties defendant, based the right of appellee to recover against them on substantially the same facts alleged in the amendment on which the trial was had, and the court informed the jury that the running of the statutes of limitation ceased when the first amended petition was filed.

In this there was no error, even though both amendments as to Julius Kauffman were bad on general demurrer. Killebrew
152 *v.* Stockdale, 51 Tex., 529; Hill *v.* Clay, 26 Tex., 650; Kinney *v.* Lee, 10 Tex., 155.

Limitation began to run in his favor from the time he received property in gift from his mother and so continued until January 25, 1884, less such intervening time as he may have been absent from the State.

If, excluding that, two years elapsed between the times named, then the action was barred as to him, but in view of other questions considered we do not feel called upon to examine that question of fact.

For the errors noticed the judgment will be reversed and cause remanded unless appellee shall elect to dismiss his action as to Julius Kauffman, in which event it may be reversed and cause dismissed as to him and affirmed against Mrs. Clara Kauffman.

STAYTON,
Chief Justice.

Filed March 21, 1890.

153 JULIUS KAUFFMAN *et al.* *vs.* JAMES C. WOOTTERS. } No. 2844. 3rd Ass't.

Appeal — Galveston county.

Opinion by Chief Justice STAYTON:

This cause came on to be heard on the transcript of the record, and the same having been inspected, because it is the opinion of this court there was error in the judgment of the court below in rendering judgment against Julius Kauffman, and appellee offering to dismiss as to him, it is therefore adjudged, ordered, and decreed that said judgment be reversed and the cause dismissed as to the said Julius Kauffman, and that the said Julius Kauffman recover from the appellee, J. C. Wootters, all costs by him in this behalf incurred, and that said judgment as to Mrs. Clara Kauffman be in all things affirmed, and that the appellee, J. C. Wootters, recover from the appellant Mrs. Clara Kauffman the amount adjudged below and all costs in this behalf incurred except the costs herein adjudged in favor of appellant Julius Kauffman, and that this decision be certified below for observance.

154 *Petition for Writ of Error.*

CLARA KAUFFMAN
vs.
JAMES C. WOOTTERS.

To the Honorable John W. Stayton, chief justice of the supreme court of the State of Texas:

And now comes Clara Kauffman, by Waul & Walker, her attorneys, and complains that in the record and proceedings and also in the rendition of a judgment in a suit between Julius Kauffman and Clara Kauffman, appellants, and James C. Wootters, appellee, in the supreme court of the State of Texas, being the highest court of law and equity of said State in which a decision could be had in said suit, and in which a final judgment was rendered against her on the — day of March, 1890, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of such its validity, and wherein also was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right and privilege specially set up and claimed by said Clara Kauffman under said clause of said Constitution, all which appears in the records and proceedings in said suit, and whereby manifest error hath happened, to the great damage of the said Clara Kauffman:

155 Wherefore she prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

WAUL & WALKER,
Att'ys for Clara Kauffman.

Allowed.

JOHN W. STAYTON,
Chief Justice Sup. Court, Texas.

Filed Mar. 29, 1890.

D. D. ATCHISON, *Clerk.*

156 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at Galveston, between Julius Kauffman and Clara Kauffman, appellants, and James C. Wootters, appellee, numbered 2844 upon the docket of said supreme court, on the — day of March, 1890, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being

repugnant to the Constitution or laws of the United States and the decision was in favor of their validity, and wherein was also drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right and privilege claimed under such clause of the Constitution, a manifest error hath happened, to the damage of said Clara Kauffman, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do commanded you, if judgment be therein given, that then, under your seal, distinctly and openly, you
157 send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
[SEAL.] the said Supreme Court, the 28th day of March, in the year of our Lord one thousand eight hundred and ninety.

C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

Allowed by—

JOHN W. STAYTON,
Chief Justice Sup. Court, Texas.

Filed March 29, 1890.

D. D. ATCHISON, *Clerk.*

158 *Duplicate Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at Galveston, between Julius Kauffman and Clara Kauffman, appellants, and James C. Wootters, appellee, numbered 2844 upon the docket of said supreme court, on the — day of March, 1890, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution or laws of the United States and the decision was in favor of their validity, and wherein was also drawn in question the construction of a clause of the Constitution of the United States and the decision was against the right and privilege claimed under such clause of the Constitution, a manifest error hath happened, to the damage of said Clara Kauffman, as by her complaint

appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be
159 therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL.] of the said Supreme Court, the 28th day of March, in the year of our Lord one thousand eight hundred and ninety.

C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

Allowed by—

JOHN W. STAYTON,
Chief Justice of Sup. Court, Texas.

Filed March 29, 1890.

D. D. ATCHISON, *Clerk.*

160 *Citation.*

THE UNITED STATES OF AMERICA:

To James C. Wootters, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Texas, at Galveston, wherein Clara Kauffman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of March, in the year of our Lord one thousand eight hundred and ninety.

JOHN W. STAYTON,
Chief Justice Sup. Court, Texas.

Filed March 29, 1890.

D. D. ATCHISON, *Clerk.*

(Endorsed:) Galveston, Texas, September 13, 1890. Service of within citation is hereby waived. Geo. Mason, atto. of J. C. Wootters, def't in error.

161 Know all men by these presents that we, Clara Kauffman, Julius Runge, Henry I. Runge, and F. Lammers, are held and firmly bound unto James C. Wootters in the full and just sum of thirty thousand dollars, to be paid to the said James C. Wootters, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of March, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the supreme court of the State of Texas, in a suit depending in said court between Julius Kauffman and Clara Kauffman, appellants, and James C. Wootters, appellee, judgment was rendered against the said Clara Kauffman for the sum of ($20,135.64) twenty thousand one hundred and thirty-five dollars and sixty-four cents, with the interest at the rate of 8 per cent. per annum from the 17th of October, 1889, until paid, and the said Clara Kauffman having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James C. Wootters, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

162 Now, the condition of the above obligation is such that if the said Clara Kauffman shall prosecute her writ of error to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MRS. CLARA KAUFFMAN,
By F. HUBER,
Her Attorney-in-Fact.
JULIUS RUNGE. [SEAL.]
HENRY J. RUNGE. [SEAL.]
F. LAMMERS. [SEAL.]

Sealed and delivered in presence of—

H. P. DREUT.
CHAS. KENCKEL.

Approved by—

JOHN W. STAYTON,
Chief Justice Sup. Court, Texas.

Filed March 29, 1890.

D. D. ATCHISON, *Clerk.*

163 Supreme Court of the State of Texas.

I, D. D. Atchison, clerk of the supreme court of the State of Texas, holding its sessions in Galveston, do hereby certify the foregoing to be

a true and correct copy of the record and of all proceedings in case No. 2844, entitled Julius Kauffman and Clara Kauffman, appellants, *vs.* James C. Wootters, as the same now appears in my office.

To certify which witness my hand and the seal of said court, at Galveston, this the 18 day of September, 1890.

[Seal Supreme Court of the State of Texas.]

DAN'L D. ATCHISON, *Clk.*

Endorsed on cover: Texas supreme court. No. 1360. Clara Kauffman, plaintiff in error, *vs.* James C. Wootters. Filed October 8, 1890.

Office Supreme Court U. S.
FILED,
DEC 31 1890
JAMES H. McKENNEY
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1360.

CLARA KAUFFMAN, PLAINTIFF IN ERROR,

vs.

JAMES C. WOOTTERS.

IN ERROR TO THE SUPREME COURT OF TEXAS.

BRIEF ON DEFENDANT'S MOTION TO DISMISS OR AFFIRM.

T. N. WAUL,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1360.

CLARA KAUFFMAN, PLAINTIFF IN ERROR,

vs.

JAMES C. WOOTTERS.

IN ERROR TO THE SUPREME COURT OF TEXAS.

And now comes Clara Kauffman, the plaintiff in error, and in reply to the defendant's motion to dismiss or affirm, files the following

BRIEF.

Statement of the Case:

1. The transcript commences with the second amended original petition, filed by leave of the court, October 5, 1885, in lieu of and substitution for his first amended original petition, filed January 25, 1884, and all other pleadings theretofore filed by him. (Tr. 1[illegible].)

Under the system of pleading and practice in the State of Texas, an amended petition is a substitution for all former pleadings of the party making the amendment, and all pleadings before that time made, are not considered as part of the record.

There have been four trials and three verdicts and three judgments in the district court, in favor of the defendants in the district court. Three appeals were taken by the

plaintiff in the district court, the defendant in error, to the supreme court of the State of Texas, and three reversals by said court, remanding the cause for a new trial.

On the fourth trial there was a verdict and judgment for plaintiff in the district court, from which the defendants in that court appealed, and the supreme court of the State of Texas, upon the defendant in error dismissing the case against Julius Kauffman, one of the defendants, affirmed the judgment against Clara Kauffman, from which judgment this writ of error has been granted.

Hence it will be seen that it is the first opportunity the plaintiff in error has had to test the question of jurisdiction; the former judgments of the supreme court of Texas not being final judgments, no writ of error could be taken.

An examination of the transcript will show that from the first appearance of Clara Kauffman, by her attorneys in the cause, she objected to the jurisdiction of the State courts, and has so continuously objected.

On the 6th of June, 1885, before the filing of the second amended original petition, is the following:

JAMES C. WOOTTERS ET AL.
vs.
JOHN K. WOOTTERS, HENRY N. DUBLE, CLARA KAUFMAN, JULIUS KAUFMAN. } No. 6677.

And the said defendant, Clara Kaufman, who makes her appearance by her attorneys for this purpose only, and moves the court to quash the service of citation by publication filed in this cause, because the same was pretended to be served by publication made in a newspaper, published weekly, on Sunday, called the Sunday Opera Glass, in the city and county of Galveston, and that the said publication was made therein on Sunday, the 4th of May, 1884, on Sunday, the 11th of May, 1884, on Sunday, the 18th of May, 1884, and on Sunday, the 25th of May, 1884, and on no other days and in no other newspapers, this suit not being a suit for attachment, injunction or sequestration. Wherefore she prays that said citation be quashed.

WAUL & WALKER,

Attorneys appearing for Mrs Clara Kaufman for this motion.

Filed June 6th, 1885.

Tr., 24, also in defendants' bill of exceptions No. 1. Tr., 38, and in statement of facts, Tr., 59, 60.

Judgment on Motion Sustained.

J. C. WOOTTERS ET AL.)
vs.) No. 6677.
J. KAUFMAN ET AL.)

June 8th, 1885.

This day came on to be heard the motion of the defendant to quash the service herein on Clara Kaufman, which said motion being duly considered by the court, it is ordered that the service made on the defendant, Clara Kaufman, be, and is hereby, quashed, the opinion of the court being that the petition discloses no cause of action against Julius Kaufman, his demurrer and exceptions are sustained, to which ruling of the court plaintiff excepts.

Plaintiff has leave to file an amended original petition in lieu of all former pleadings, and cause continued. (Tr., 24, 25; Tr., 38, 39; Tr., 60, 61.)

The judge having decided that the petition contained no cause of action, and having quashed the citation the legal conclusion would be that, without proper service or notice of the new petition, Julia Kauffman was released from further attendance on the court.

The court insisting on retaining jurisdiction over her person by virtue of her motion to quash the citation (although ~~overruled~~) to the next term of the court, she filed the following plea to the jurisdiction:

Defendant's Plea to Jurisdiction, filed Oct. 13, 1885.

J. C. WOOTTERS ET AL.,)
vs.) No. 6677.
JULIUS KAUFMAN ET AL.)

And this defendant, Clara Kaufman, to the second amended petition to the original and first amended petition, says that this court has no jurisdiction over her person, for this: That no proper service of citation has been made on her by publication or in any other manner; that said pretended service made by publication in the Sunday Opera Glass was null and void, because she says the said newspaper is a weekly newspaper published in the city of Galveston, and on no other day excepting Sunday; that said publication was made on Sunday, May 4, 1884; on Sunday, May 11, 1884; on Sunday, May 18, 1884, and May 25, 1884,

and on no other days; and that it is forbidden by law that any process shall be served on Sunday except in cases of injunction, attachment or sequestration, and that this suit is not a case of injunction, attachment or sequestration, which she is ready to verify. Wherefore she prays judgment whether this court can or will take further cognizance of the suit against her.

WAUL & WALKER,
Attorneys for Clara Kauffman, Defendant.

(Tr., 27.)

Upon which plea the court on the same day made the following order:

J. C. WOOTTERS ET AL.
vs.
J. KAUFMAN, ET AL. } No. 6677.

October 13th, 1885.

The suggestion of the death of the defendant, Duble, who died insolvent without any assets or administration, and plaintiff dismisses as to him, and the plea as to service by publication on the defendant, Mrs. Julia Kaufman, was acted on at the last term of court, and the service, on motion of her attorney, was quashed, as the publications were made on four consecutive Sundays, and now the said defendant renews her said plea to jurisdiction and claims she is not subject to the jurisdiction of the court, in that no other service than said publication was ever had on her, and it being the opinion of the court that said service having, on her motion, been quashed at last term, she is now, by virtue of the *spirit* of the statute, legally in court at the present term, the same as if there had been personal service on her, and to this ruling she excepts. (Tr., 39.)

The case was then tried and a verdict and judgment rendered for the defendants Plaintiffs appealed to the supreme court of the State of Texas, and the judgment was reversed; and on the return of the mandate, Julia Kaufman filed the following plea to the jurisdiction of the court:

Amended Answer to Plaintiff's Second Amended Petition. Filed October 12, 1889, District Court, Galveston County, to October Term, 1889.

JAMES C. WOOTTERS ET AL.
vs.
JULIUS KAUFMAN ET AL. } No. 6677.

And now comes the defendant, Clara Kaufman, by leave of the court, and appearing for this purpose only, and says that this court has not and should not take jurisdiction over her; nor is she required by the law of the land to answer the complaint of said plaintiffs, because she says at and before the institution of this suit against her, ever since and at present she is and was a resident of Bremen, in the Empire of Germany, and a non-resident of the State of Texas; that no citation or notice of the pendency of said suit has ever been served upon her personally or within the State of Texas; that service was pretended to be made by a publication in a weekly paper, published in the city of Galveston, called the Sunday Opera Glass; that upon motion of defendant, who appeared for that purpose only, the said notice was declared null and void and was quashed by this honorable court; and now, again for this purpose only, the said defendant appears and pleads to the jurisdiction of this court, and says that never having submitted to the jurisdiction of this court, or appeared or made any appearance except specially to object to the jurisdiction, and never having been served within the State with citation or other notice, and residing in a foreign State, and never having consented to acknowledged service of process, this court should not and can not legally take jurisdiction of her person; that so to do would be in violation of the constitution of the United States and the constitution of the State of Texas, and that such assumption would be without due process of law and contrary to the law of the land; all of which will be verified by the record. Wherefore she prays judgment.

WAUL & WALKER,
Attorneys for Clara Kaufman.

(Tr., 21, 22.)

Upon which plea the following judgment was entered:

J. C. WOOTTERS
vs.
J. KAUFMAN, ET AL. } No. 6677.

October 14th, 1889.

The defendants' plea as to the service by publication on the defendant, Mrs. Julia Kaufman, was acted on at the

June term, 1885, of this court, and said service, on motion of her attorney, was then quashed, as the publications were made on Sundays, and the cause at said June term was continued; and at the October term, 1885, the said defendant renewed her plea to the jurisdiction, and claimed that she was not subject to the jurisdiction of the court, in that no other service had been made on her; than said publication; and it then being the opinion of the court that the said service, on the motion of her attorney, had been quashed at the previous term; that she was then, by virtue of the statute, legally in court at the said October term, 1885; and the court now, at its present term, adheres to its said former ruling, and is strengthened in the ruling by reason of the further fact that the cause was carried to the supreme court on appeal, and the action of the supreme court had on the question of jurisdiction affirming it, it is therefore ordered, adjudged and decreed that the defendants' plea to the jurisdiction is again overruled; to which ruling of the court the said Julia Kaufman excepts, and prays that this, her bill of exceptions, be signed and made a part of the record in the case, the same having been submitted to counsel for plaintiff and presented to the court on the day of October, 1889.

WAUL & WALKER,
Attorneys for Clara Kaufman.

I hereby certify that on this 30th day of October, 1889, the foregoing bill of exceptions was presented to me, and I approve and certify and sign the same as a true and correct bill of exceptions, and order the same to be filed and constitute part of the record of the cause, this 30th October, 1889.

WM. H. STEWART,
Judge Tenth Judicial District.

Filed October 30, 1889.

ALEX. EASTON,
Clerk D. C. G. Co.

(Tr., 40.)

A judgment having been rendered for plaintiff, the defendant made a motion for a new trial, and as the cause for ~~of~~ new trial on behalf of Julia Kauffman filed the following:

And the said Clara Kaufman, for cause why a new trial shall be granted, shows:

First—That this court has no jurisdiction, it being shown by the testimony and pleadings in the cause that long before, at the time, and ever since the institution of this suit, she was a non-resident of the State of Texas and was

a resident of the empire of Germany; that she never appeared personally, nor received service of citation, or authorized any one to receive service for her, nor did she waive service of citation or authorize any one to waive service of citation or notice of the institution of this suit for her, nor did she authorize any person to appear for her, except to object specially to the jurisdiction of this court, as is shown by the record in the cause, and that the court erred in assuming jurisdiction of the case over the person of her, who, through her attorney, was protesting against the court so taking jurisdiction, and that the said several rulings of the court are in violation of the constitution of the United States, said jurisdiction being taken without "due process of law and against the law of the land," no personal service being made upon her in this State or within the jurisdiction of this court, nor any voluntary appearance being made by her in said suit.

The motion for new trial was overruled, to which ruling the defendant excepted, and in open court gave notice of appeal. (Tr., 36.)

And the following is among the errors assigned:

Assignment of Errors, Filed January 9th, 1890. District Court, Galveston County.

JAMES C. WOOTTERS, ET AL.
vs.
JULIUS KAUFMAN, ET AL.
No. 6677.

And the defendants, Clara Kaufman and Julius Kaufman, assign the following errors in the above stated case:

* * * * * * * * *

6. That the court erred in its order made on the 13th of October, 1885, as follows: "And the plea as to the service by publication on the defendant, Mrs. Clara Kaufman, was acted upon at the last term of the court, and the service, on motion of her attorney, was quashed, as the publication was made on four consecutive Sundays; and now the defendant renews her said plea to the jurisdiction and claims she is not subject to the jurisdiction of the court, in that no other service than said publication was ever made on her, and it being the opinion of the court that said service on her motion being quashed at last term, she is now, by virtue of the spirit of the statute, legally in court at the present term, the same as if there had been personal service on her, and to this ruling she excepts."

And the court erred in its judgment, entered on the 14th of October, 1889, in overruling defendant Clara Kaufman's plea to the jurisdiction of the court, filed October 12th, 1889, as the pleading and testimony in the cause shows that said Clara Kaufman long before, at the time, and since the institution of this suit, until the said trial of said cause on the 14th of October, 1889, was a non-resident of the State of Texas, and was a resident of the empire of Germany; that she never appeared personally, nor received service of citation or authorized any one to receive service for her, nor did she waive service of citation, or authorize any one to waive service of citation or notice of the institution of this suit for her, nor did she authorize any person to appear for her, except to object specially to the jurisdiction of this court, as shown by the record in the cause; and that the court erred in assuming jurisdiction of the case over her person, who, through her attorneys, was protesting against the court's so taking jurisdiction, and that the said several rulings of the court are in violation of the constitution of the United States, said jurisdiction being assumed without "due process of law," and in violation of the law of the land, no service being made on her personally or otherwise, and no voluntary appearance being made by her in said suit. (Tr., 68, 69.)

The only notice upon the question of jurisdiction in the opinion of the learned chief justice is "That the court had acquired jurisdiction as to her, was held on a former appeal," and on which former appeal the construction of the Texas statutes was only considered. Whether the statutes of the State of Texas are in violation of the constitution of the United States was for the first time in this suit submitted for decision to the supreme court of Texas, when the cause was appealed by defendant.

The following is the

Petition for Writ of Error.

CLARA KAUFMAN,
vs.
JAMES C. WOOTTERS.

To the Honorable John W. Stayton, Chief Justice of the Supreme Court of the State of Texas:

And now comes Clara Kaufman, by Waul & Walker, her attorneys, and complains that in the record and proceed-

ings and also in the rendition of a judgment in a suit between Julius Kaufman and Clara Kaufman, appellants, and James C. Wootters, apellee, in the supreme court of the State of Texas, being the highest court of law and equity of said State in which a decision could be had in said suit, and in which a final judgment was rendered against her on ——day of March, 1890, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the constitution of the United States and the decision was in favor of such its validity, and wherein was also drawn in question the construction of a clause of the constitution of the United States and the decision was against the right and privilege specially set up and claimed by said Clara Kaufman under said clause of said constitution, all of which appears in the records and proceedings of said suit and whereby manifest error hath happened, to the great damage of said Clara Kaufman; wherefore she prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the supreme court of the United States.

WAUL & WALKER.
(Tr., 77.) Attorneys for Clara Kaufman.

We trust that the foregoing statements from the records will show that the federal question raised here was raised both in the district court of the State of Texas and in the supreme court of said State, and was decided in said courts, and that the decision of the question was necessary to the judgment rendered in the cause by the supreme court of the State.

The assignment of errors, when presented to this court, and not the petition for the writ of error, will be the proper test whether the question is brought before this court in such manner as to allow its being heard.

On the submission of this motion we will endeavor to show that the question on which jurisdiction depends, is not so frivolous that further argument will not be heard, and that the writ of error was not sued out for delay, and the transcript of the record fails to show that a continuance or delay was on any occasion asked for by the plaintiff in error.

As the construction of the statute is fixed by the decision of the supreme court of the State of Texas, our suggestions on this motion are

I.

That the supreme court of the State of Texas erred in rendering judgment against the plaintiff in error, over the sixth assignment of error filed by Clara Kauffman, appellant in the supreme court of Texas, to wit:

Sixth Assignment of Error, by Clara Kauffman.

That the court erred in its order made on the 13th of October, 1885, as follows:

"And the plea as to service by publication on the defendant, Mrs. Clara Kauffman, was acted upon at the last term of court, and the service, on motion of her attorney, was quashed, as the publication was made on four consecutive Sundays, and now the defendant renews her said plea to the jurisdiction, and claims she is not subject to the jurisdiction of the court, in that no other service than said publication was ever made on her, and it being the opinion of the court that said service having on her motion been quashed at the last term, she is now by virtue of the spirit of the statute legally in court at the present term, the same as if there had been personal service on her, and to this ruling she excepts." (Tr., 68; also in Bill of Exceptions No. 1, Tr. 39, bottom of page.)

II.

That the supreme court of the state of Texas erred in rendering judgment against the plaintiff in error over the sixth assignment of error, filed by Clara Kauffman, appellant in the supreme court of Texas, to-wit:

And the court erred in its judgment entered on the 14th of October, 1889, in overruling defendant, Clara Kaufman's, plea to the jurisdiction of the court, filed October 12, 1889, as the pleadings and testimony in the cause shows, that said Clara Kauffman long before, at the time and since the institution of the suit, until the said trial of said cause on the 14th of October, 1889, was a non-resident of the State of Texas, and was a resident of the Empire of Germany, that she never appeared personally, nor received service of citation or authorized any one to receive service for her, nor did she waive service of citation or authorize any one to waive service of citation or notice of the institution of this suit for her, nor did she authorize any person to appear for her, except to object specially to the jurisdiction of this court,

as is shown by the record in the cause, and that the court erred in assuming jurisdiction of the case over her person, who through her attorneys was protesting against the courts so taking jurisdiction, and that the said several rulings of the court are in violation of the constitution of the United States, said jurisdiction being assumed and taken without "due process of law" and in violation of the law of the land, no service being made on her personally or otherwise, and no voluntary appearance being made by her in said suit. (Tr., pp. 68, 69; plea to jurisdiction, Tr., 21.)

Point 1.

The several provisions of the statute of the State of Texas which, under the construction of the supreme court of the State of Texas, it is contended are in violation of the constitution of the fourteenth amendment to the constitution of the United States, are the following articles taken from the Revised Statutes of the State of Texas:

Article 1240. The defendant may accept service of any process, or waive the issuance of service thereof, by a written memorandum signed by him or his duly authorized agent or attorney, and filed among the papers of the cause, and such waiver or exceptions shall have the same force and effect as if the citation had been issued and served as provided by law.

Article 1241. The defendant may in person, or by attorney, or by his duly authorized agent, enter an appearance in open court, and such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if citation had been duly issued and served as provided by law.

Article 1242. The filing of an answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance of service of citation upon him.

Article 1243. Where the citation or service thereof is quashed on motion of the defendant, the case may be continued for the term, but the defendant shall be deemed to have entered his appearance to the succeeding term of the court.

Article 1244. Where the judgment is reversed on appeal or writ of error taken by the defendant for the want of service, or because of defective service of process, no new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed.

Article 1245. No judgment shall in any case be rendered against any defendant unless upon service, or acceptance, or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except where otherwise expressly provided for by law.

Construing Arts. 1241, 1242 the supreme court of Texas decides that a *special* appearance of a defendant denying the jurisdiction of the court over his person is such an appearance as waives process and brings the defendant personally into court, authorizes jurisdiction over his person, and admits of no defense except to the merits.

It is true, that in construing Article 1243, in the case of Liles vs. Woods & Co., 58 Texas, 416, rendered in January, 1883, four years after the adoption of the Revised Statutes of Texas, and more than two years before Clara Kauffman's motion to quash, Justice Stayton says: "Nor is it necessary "to consider the sufficiency of the service, for the court sus- "tained exceptions to the service on the 9th of April, 1881, "and continued the cause until the next term. It does not "appear that subsequent to that time any service was had "upon Liles, and he was therefore under no obligation to "appear; but the record shows he did appear on the 25th "of June, 1881, and took no exception to the jurisdiction "of the court over him for want of service, but then filed "pleas to the jurisdiction of the court, setting up the fol- "lowing matters. * * * * * All of these "pleas went to the jurisdiction of the court as to the sub- "ject matter of the suit, and to the venue of the case." 58 Texas R., 418, 419.

In the case now before the court, the motion to quash was made and *sustained*; and protesting and pleading to and denying the jurisdiction of the court as to her person, the district court decided she was under its jurisdiction to plead to the merits. At the same time with her plea to the jurisdiction, she plead other matters in defense, which it is admitted in defendant's brief, page 4, she had a right to do, and which, under the statutes, was her duty.

Revised Civil Statutes of Texas, art. 1262: "The defendant in his answer may plead as many several matters, whether of law or fact, as he shall think necessary for his

defense, and which may be pertinent to the cause: *provided*, that he shall file them all at the same time, and in due order of pleading."

And in the absence of such express statute

"Illegality in a proceeding by which the jurisdiction is "to be obtained, is in no case waived by the appearance of "the defendant for the purpose of calling the attention of "the court to such irregularity; nor is the objection waived "when, being urged, it is overruled. And the defendant "thereby is compelled to answer. He is not considered as "abandoning his objection because he does not submit to "further proceedings without contestation. It is only "when he pleads to the merits in the first instance without "insisting upon the illegality, that the objection is deemed "to be waived." (Harkness vs. Hyde, 98 U. S. R., 479.)

Point 2.

The laws of Texas, as construed by the supreme court of the State, conflict with that part of the fourteenth amendment—

"Nor shall any State deprive any person of life, liberty "or property, without due process of law."

Since the adoption of the fourteenth amendment, which was to limit the power of the States, as was the fifth amendment to limit the power of the United States, it is held: "That proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction," do not constitute "due process of law." And although the "law of the land" or "due process of law" may be indefinite and only to be rendered certain as cases arise, "there can be no doubt of their mean-"ing when applied to judicial proceedings. They then "mean a course of legal proceedings according to those "rules and principles which have been established in our "system of jurisprudence for the protection and enforcement of private rights." (Pennoyer vs. Neff, 95 U. S., 733.)

"Due process of law" is its regular administration through courts of justice by a timely and regular course of proceedings to judgment and execution. As a rule it includes parties, regular pleadings, and a trial according to the settled course of proceeding.

It requires that a person be brought into court and have the opportunity to prove any fact for his protection. (People vs. Essex Co., 70 N. Y., 229.)

Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact, which according to the usages of the common law or the provisions of the constitution would be a protection to him or to his property. (Cooley's Constitutional Limitations, page 369, and note 2.)

"Due process of law" requires that: 1. There shall be personal service of process upon the defendant within the territorial limits of the State by a duly authorized officer of the court or his voluntary and general appearance in the action before a valid judgment in *personam* can be rendered against him in the circuit court, and if the statutes of the State purport to allow such a judgment to be rendered without either of these requisites, they are unconstitutional, and the judgment so rendered would be void.

Pennoyer vs. Neff, 95 U. S. R, 714.
Harkness vs. Hyde, 98 U. S. R., 476.
St. Clair vs. Cox. 106 U. S. R., 350.
De Arcy vs. Ketchum et al., 11 How , 165.

Under the authority of the statutes of the State of Texas, notice was given by publication in the Opera Glass, a *Sunday* paper published weekly on *Sunday* only, perhaps not known to one tenth of the population of the city, and which is decided to be null and void, and quashed, yet the laws of the State of Texas are said to declare that the defendant, a subject and resident of the Empire of Germany, who comes *in limine* to object to the jurisdiction, by that very act acknowledges the jurisdiction and is in court for all purposes except to try the only question she has submitted to the court for consideration, even after the question of jurisdiction is decided in her favor, and this is said to be due process of law, and to sustain it the supreme court of Texas holds:

"And a statute declaring what shall be deemed an appear-
" ance which makes notice to a defendant of the pendency

"of an action against him, and opportunity to know its "nature and fully to defend it, necessary, does not contra- "vene the letter or spirit of any constitutional provisions "intended for the protection of private right."

York vs. The State, 11 So. Rep., 870.

This is very plain. There is no mistaking its import. It asserts the equity and justice of the State statute, that it is not repugnant to the fourteenth amendment of the constitution and does not infringe upon those personal and private rights that originated far beyond the constitution, were established at Runymede, and have been asserted by able judges and learned expounders of constitutional law, written and unwritten, thence hitherto, and we hope we will be pardoned for adhering to their construction of the law as it aforetime was, and, as we contend, now is, and asserting our faith in the proposition that "due process of law" in judicial proceedings, means a course of legal proceedings in substantial accordance with those rules and principles relating to the essential and fundamental principles of liberty and justice which were established in our systems of jurisprudence, for the protection and enforcement of private rights at the time of the adoption of the constitution of the United States, among which is prominent that a general appearance or an answer to the merits is alone a waiver of a court's jurisdiction over the person of a party attempted to be brought into court, and if the appearance is *special* and solely for the purpose of objecting to the jurisdiction, it will not amount to a waiver of the objection, even if he answer to the merits after his objection to the jurisdiction is overruled.

Harkness vs. Hyde, 98 U. S., 476.

United States vs. Am. Telephone Co., 29 Fed. R., 45.

Can a State override and annul these principles by declaring that a special appearance shall be a general appearance? With the same propriety the State might declare that the presence of the defendant in the court-room, or within the borders of the State, should be such an appearance as would give the court jurisdiction over his person.

If a judgment when rendered is void, can any reason be advanced that should prevent a defendant from interfering for the purpose alone of preventing the entry of a void judgment? And our contention is that neither by legal enactment nor judicial construction can it be declared the "law of the land" that a party may be deprived of the right of contesting the jurisdiction of any court when he is required to appear as defendant when he has neither made a general appearance, waived service of process, or answered to the merits before objecting to the jurisdiction of the tribunal.

In the case of York vs. The State of Texas, decided at the present term of the supreme court of the United States, Justice Brewer says, as quoted in defendant's brief, page 12:

"The State has full power over remedies and procedure " in its own courts, and can make any order it pleases in " respect thereto, provided that substance of right is secured " without unreasonable burden to parties and litigants."

An examination of the law of Texas will show whether the plaintiff in error is entitled to the benefits of the above proviso.

The supreme court of the State of Texas has held that when a judgment recites that the defendant has been duly cited it is conclusive against him, although the record may show a defective service or no service (Tredway vs. Eastburn, 57 Texas, 209; Davis vs Robinson, 70 Texas, 397), from which it follows that if a party fails to appear to contest the illegal service the jurisdiction is rendered absolute.

It is decided (Galveston, etc., Ry. Co. vs. Ware, 74 Texas, 49), that in case of a void judgment, an injunction will not be granted to enjoin an execution on a void judgment when the defendant has failed to avail himself of an appeal or writ of error or a certiorari.

G., H. & S. A. Ry. Co. vs. Ware, 74 Texas, 49.

Nor could the defendant obtain relief in the federal courts, as no injunction could be obtained to stay proceedings in a State court (Rev. Stat., sec. 720); nor if the authority was vested in the federal court would it be exercised so long as defendant might have a remedy at law. Thus

the defendant's property is submitted to illegal executions and spoliation, or he is forced to take an appeal to the supreme court, and when he has done so, he is met by the provision of Article 1244: "When the judgment "is reversed on appeal for the want of service, or defective "service, the defendant shall be presumed to have entered "his appearance to the term of the court at which the "mandate shall be filed." Nor can we imagine any method of escaping the net so cast around a defendant. We respectfully submit that the State of Texas has placed itself within the very exception made by the learned justice; and the substance of right is not secured without unreasonable burden to parties and litigants.

"Upon the construction of the constitution and laws of "a State, this court, as a general rule, follows the decisions "of her highest court, unless they conflict with or impair "the efficiency of some provision of the federal constitu- "tion, or of a federal statute, or a rule of general commer- "cial law."

Gormley vs. Clark, 134 U. S. R., 348.

Norton vs. Shelby Co., 118 U. S. R., 439.

These opinions contain similar provisos.

In the case of Sugg vs. Thornton, 132 U. S. R., 524, referred to by counsel for appellant, no federal question was raised in the trial court, nor was the principle here invoked there decided. The court say:

"The notice authorized by Article 1230 can not of course "have any binding effect personally on the party served "therewith; but if the suit or proceeding is intended to "affect property in Texas belonging to him, or in which "he is interested, the notice may be very proper to apprise "him of it, and give him an opportunity to look after his "interest if he chooses. For this purpose it might be to "his advantage to receive it. It can not legitimately serve "any other purpose; and it does not appear to have been "used for any other purpose in this case."

Sugg vs. Thornton, 132 U. S. R., 530.

Point 3.

The statutes of Texas upon this subject are not of a local nature confined to the State. They affect the citizens of

every State in the Union, and citizens and subjects of foreign states who may have commercial or other business transactions with the citizens of Texas. And the decision of this court that the statutes of Texas do not conflict with the last clause in the fourteenth amendment will cause the privileges and rights of litigants in many cases to depend, not upon uniform and settled law as to how jurisdiction is to be obtained or defeated by non-residents, but upon the contingency of litigation; whether before a State or a federal court.

Under the laws of congress, authorizing the removal of suits from the State courts into the federal courts, this question necessarily will come before the courts for adjudication; and tried as if the case originated in the federal court and the service made by the marshal.

Then, if the decision of the supreme court of the State is adopted, they will hold that the plea to the jurisdiction is a general appearance; that the defendant has acknowledged the jurisdiction, and necessarily overrule the plea to the jurisdiction and require the defendant to answer to the merits. Not only in such case, but in all cases hereafter brought in the federal court in this State, no matter how defective may be the citation, or how illegal the service, or even without service, or without jurisdiction over the person, should the defendant make a motion to quash, or plead in abatement of the writ, or to the jurisdiction of the court, without a hearing, the court would decide that the defendant, by his special appearance and protest, waived all irregularities in formalities and submitted himself to the jurisdiction of the court; and this is to be ruled "due process of law" and "the law of the land" until, perchance, upon sober second thought, the supreme court of the State may again change its ruling. The effect of adopting the decision of the supreme court of the State would be, indirectly if not directly, to annul the provisions of the fourteenth amendment.

The decision of the supreme court of the State of Texas is a departure from its former rulings when the question has been brought before them for adjudication, before the

decision of the case of York vs. The State; and a reversal of such earlier decisions is not binding upon this court, and should not have any validity against citizens of other States or of foreign countries.

The revised statutes of Texas were adopted in 1879, and in addition to the case of Lyles vs. Woods, 58 Texas, 419, before referred to, the case of Continental Insurance Co. vs. Milliken, 64 Texas, 46, decided April 24, 1885, was upon a citation issued on the 14th of June, 1884. Exceptions were made to the service of citation and overruled; other pleadings were had, but not considered on appeal, and the judgment of the supreme court was:

"For the error of the court below in overruling the ex-"ceptions to the return on the citation, the judgment is "reversed and the cause remanded." (64 Texas, 48.)

The Bradstreet Co. vs. Gill, 72 Texas, 116, decided in 1888, the company plead in abatement want of service, together with pleas to the merits. The court *a quo* decided against the plea; the case was tried on its merits, a judgment rendered against the Bradstreet Co., who appealed, an elaborate opinion given and judgment reversed, and for the error of the judge in charging against the plea in abatement. (72 Texas, 116. Also Robertson vs. Schmidt, 48 Texas, 19.)

The above and many other cases show that the pleas in abatement to the jurisdiction and to the merits should be plead together and without prejudice to the defendant.

We contend that under such a course of decisions, even outside of the constitutional objection, the statutes are fairly open to construction by this court, and if adverse to the opinion of the supreme court of Texas, it should so rule.

The case of Gelpcke vs. City of Dubuque, 1 Wall., 175, is full upon this point, and we know of no case where the remarks there made should be more applicable than the present:

"We are not unmindful of the importance of uniformity "in the decisions of this court and those of the highest "local courts, giving constructions to the laws and consti-"tutions of their own States. It is the settled rule of this

"court in such cases to follow the decisions of the State "courts, but there have been heretofore, in the judicial "history of this court, as doubtless there will be hereafter, "many exceptional cases. We shall never immolate truth, "justice and the law because a State tribunal has erected "the altar and decreed the sacrifice." (Gelpcke vs. City of Dubuque, 1 Wall, 206-7.)

T. N. WAUL,
Counsel for Plaintiff in Error.

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Office Supreme Court U.S.
FILED,
DEC 6 1890
JAMES H. McKENNEY
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890. No. 1360.

CLARA KAUFFMAN, Plaintiff in Error,

vs.

JAMES C. WOOTTERS.

IN ERROR TO THE SUPREME COURT OF TEXAS.

Motion to Dismiss or Affirm, and Brief Thereon.

A. H. GARLAND,
H. J. MAY,
Counsel for Defendant.

McGILL & WALLACE
PRINTERS,
1107 E STREET N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890. No. 1360.

CLARA KAUFFMAN, PLAINTIFF IN ERROR,

vs.

JAMES C. WOOTTERS.

IN ERROR TO THE SUPREME COURT OF TEXAS.

Motion to Dismiss or Affirm, and Brief thereon.

Comes the defendant in error and moves the Court to dismiss the writ of error herein, as this Court has no jurisdiction thereof; or to affirm the judgment, it being manifest that even if the Court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument.

A. H. GARLAND,
H. J. MAY,
Counsel for Defendant.

BRIEF.

The record in this cause does not of itself give the Court the full history of this case. The points attempted to be raised in it are so scattered and disconnected it was necessary to print the record in full on this motion, and it is deemed proper here to file a statement of this case now grown old and almost ancient.

This suit was instituted in 1874 and has been tried, on the merits, four times in the State Courts.

First Trial and First Appeal.

The suit was brought, in April, 1874, in the District Court of Galveston County, Texas, by James C. Wootters and W. P. Hayes, composing the firm of J. C. Wootters & Co., plaintiffs, against H. N. Duble and John H. Wootters, composing firm of Duble & Wootters, Cotton Factors, &c., at Galveston, and Julius Kauffman, carrying on business under the name of Kauffman & Runge, defendants, to recover one hundred and thirty-five bales of cotton, or its value—plaintiffs alleging that they were the owners of the cotton, and had placed it in the hands of said factors for sale in Galveston, and that the latter, without authority of plaintiffs, had taken advances on it from said Kauffman, and had delivered it to him, and that he had shipped it to Liverpool, England, for sale there. Duble & Wootters made no defense; Kauffman's defense was that he had received and shipped the cotton with the knowledge and consent of plaintiffs, and according to custom in the usual course of trade. The case was tried in June, 1877, and verdict was rendered in favor of Kauffman as against plaintiffs, and in favor of plaintiffs against Duble & Wootters for the amount the cotton had sold for in Liverpool, less the proved charges for freight, &c., the jury stating that the evidence did not enable them to find the amount for which the cotton had been sold in Liverpool. Thereupon judgment was rendered in favor of Kauffman, "that he go hence without day," and the cause was continued for further proceedings, as to plaintiffs and the defendants, Duble & Wootters. From this judgment the plaintiffs appealed to the Supreme Court of Texas, and, on February 11, 1881, that Court dismissed the appeal for want of jurisdiction, there having been no final judgment in the Court below.

Second Trial and Second Appeal.

While the first appeal was pending, to wit, in January, 1880, the defendant, Julius Kauffman, died; and after the return of the case to the District Court it was there continued to make parties, from term to term, until January 25, 1884, when the plaintiffs filed an amended petition alleging that the defendant, Julius Kauffman, had died in January, 1880, leaving his whole estate to his widow, Clara Kauffman, and that she had received the same, and had given a large portion of it to their son, who was also named Julius Kauffman; that they were therefore liable for the demand originally sued for to the extent of the assets of said decedent so received by them, and making them parties defendant as being in the possession of the estate of the original defendant, Julius Kauffman, deceased. The amended petition also alleged that said Clara Kauffman was a non-resident of Texas, and asked for service of citation on her by publication, as provided by the laws of Texas, to wit, article 1235 of Revised Civil Statutes of Texas. Citation to her was accordingly issued May 1, 1884, and was published for the requisite period in a newspaper called *The Opera Glass*, which was published only on Sundays. Personal service was made on Julius Kauffman, the son of Julius Kauffman, deceased. No further proceedings having been had in the case, but it having been continued from term to term in the meantime, on June 6, 1885, Clara Kauffman filed her motion to quash the service on her, for causes set out in the motion. On June 8, 1885, said motion was sustained by the Court, and in the same order demurrers of Julius Kauffman to plaintiffs' amended petition having been sustained, leave was granted to plaintiffs to file a second amended petition, and the cause was continued. On October 5, 1885, plaintiffs filed a second amended petition substantially like the one amended,

but setting out the facts more in detail, and also alleging that James C. Wootters had by purchase become the sole owner of the right of action sued on, and now prosecuted as sole plaintiff, and also dismissing suit as to H. N. Duble, who had died insolvent.

On October 13, 1885, Clara Kauffman filed her plea to the jurisdiction, and at the same time, "reserving all exceptions to the rulings of the Court on her plea to the jurisdiction," filed general and special exceptions to plaintiff's second amended petition, and also several pleas—such simultaneous pleadings being in accordance with article 1262 of Revised Civil Statutes of Texas.

On the same day—October 13, 1885—the Court overruled the plea to the jurisdiction; holding that service of citation on her having been quashed, at the last term of Court, on her motion, she was held, under the statute of this State, to an appearance at the next ensuing term; and to this ruling she excepted, and her exception was noted in the order making the ruling, and thus appears in the record.

Clara Kauffman's plea to the jurisdiction being so overruled, the case proceeded to trial on the other issues made by the pleadings; and Clara Kauffman participated actively therein, with Julius Kauffman defending on the merits, offering, and objecting to, testimony, and otherwise, as appears by their bills of exceptions to rulings of the Court admitting and excluding evidence, as well as by other parts of the record. Verdict and judgment were rendered October 21, 1885, in favor of Clara Kauffman and Julius Kauffman as against plaintiff, and in favor of plaintiff as against the remaining defendant, John H. Wootters, for $16,199.54. Appeals were taken by plaintiff and by John H. Wootters. No errors were assigned by Clara Kauffman, and no bill of exception taken by her to the ruling of the Court on her plea to the jurisdiction, though her exception to such ruling appeared

in the record, as already stated. The only matters, in any way touching the question of jurisdiction, in the record taken to the Supreme Court on this appeal, were: Clara Kauffman's motion to quash service, and the order of Court thereon, and her plea to the jurisdiction and the order of the Court thereon, and her exception to said last order as noted therein. In the Supreme Court her counsel in his brief presented but one proposition relating to the question of jurisdiction (it being the brief of both Julius Kauffman and Clara Kauffman), having no allusion to said question, but being devoted to other matters, as will appear by reference to the report of the case (see Wootters *et al. v.* Kauffman *et al.*, 67 Tex. Reps., 488); from which it will be observed, that the question of jurisdiction was not sufficiently presented to attract the attention of the reporter, though the Court did refer to it in the opinion, by saying, on page 496: "We do not see that a failure to have due service of citation made upon Mrs. Kauffman would be any reason for affirming the judgment. By her appearance to quash the service she was in Court to the next term for all purposes. Besides, it is shown by the record that she appeared and filed an answer to the merits." On this appeal the judgment was reversed and the cause remanded.

Third Trial and Third Appeal.

At the October term, 1887, of the District Court, the case was again tried, upon the same pleadings as at the last previous trial, except that now the defendant, John H. Wootters pleaded his discharge in bankruptcy in the United States District Court. Clara Kauffman's plea to the jurisdiction, filed October 13, 1885, being again presented by her counsel, the following order—or rather entry—thereon was made by the Court, to wit:

"October 28, 1887. The defendant's (Clara Kauffman) motion to quash service was sustained by the Court on June 8, 1885, and on October 13, 1885, said Clara Kauffman's plea to the jurisdiction was overruled, after hearing the evidence thereon, to which ruling she excepted."

The case then proceeded to trial on the same pleadings on the part of Clara Kauffman as at the last trial, and she, by her counsel, actively participated in the defense on the merits, as is shown in the record, by her asking special charges to the jury, and by her offering evidence to support her plea of *res judicata*, and otherwise. In support of her plea to the jurisdiction, Clara Kauffman offered the citation to her issued May 1, 1884, with sheriff's return thereon, and affidavit of printer showing publication to have been made only on Sundays; her motion to quash service of June 6, 1885, with order of Court thereon of June 8, 1885; and her plea to jurisdiction of October 13, 1885, with ruling of Court thereon on the same day. Verdict and judgment were for defendants; and plaintiff appealed. The defendants assigned no errors, and took no bills of exception, though it appeared in the record then taken to the Supreme Court that Clara Kauffman's exception to the ruling of the Court on her plea to the jurisdiction of October 13, 1885, was noted in the order of Court of that date. To this exception, however, no reference was made in the Supreme Court. The question of jurisdiction was not referred to in the brief of counsel for Clara Kauffman; nor is any allusion made to it in the opinion of the Court.

See Wootters *v.* Kauffman & Runge, 73 Texas Rep., 395.

The judgment was reversed and the cause remanded, March 26, 1889.

Fourth Trial and Fourth Appeal.

At the October Term, 1889, of the District Court the case was again tried there for the fourth time.

The pleadings of the plaintiff and of the defendant, John H. Wootters, remained unchanged. The defendants, Clara Kauffman and Julius Kauffman, however, filed new pleadings, as follows: Clara Kauffman on October 12, 1889, filed another plea to the jurisdiction (Rec., 21), and at the same time, and on the same paper, she and Julius Kauffman, jointly, as a substitute for all former pleadings, filed a general demurrer and a general denial; and, pleading specially, alleged certain transactions between the original plaintiffs and the defendants, Duble and Wootters, which, they claimed, authorized the latter to hypothecate the cotton to the original defendant, Julius Kauffman, deceased, and warranted him in receiving and shipping it as he had done; and, also, pleaded the statutes of limitations in behalf of Julius Kauffman; and, also, pleaded the judgment rendered in June, 1877, as *res judicata*, in behalf of both Clara Kauffman and Julius Kauffman; and Clara Kauffman, also, presented in connection with her plea to the jurisdiction, filed October 12, 1889, the following papers, to wit: Clara Kauffman's motion of June 6, 1885, to quash the service on her, with the order of Court of June 8, 1885, sustaining said motion, and her plea to jurisdiction, filed October 13, 1885, and the ruling of Court thereon of same date, and the order of Court relative to the question of jurisdiction, made October 28, 1887 (Rec., 21 *et seq*). On October 14, 1889, the Court overruled Clara Kauffman's plea to jurisdiction of October 12, 1889 (Rec., 29).

The case then proceeded to trial on the other issues made by the pleadings, Clara Kauffman actively participating by her counsel in such trial and insisting on all the defenses set up in the joint pleadings of herself and her co-defendant. On October 19, 1889, verdict and judg-

ment were rendered for plaintiff against Clara Kauffman and Julius Kauffman for $20,135.64 (Rec., 33). Both defendants filed a motion for a new trial, Clara Kauffman separately, claiming as ground therefor that the Court had no jurisdiction over her, while she and her co-defendant jointly assigned various grounds having no connection with the question of jurisdiction, such as rulings of the Court in admitting and excluding evidence relating to other matters, &c. Such motion was overruled October 28, 1889 (Rec., 36). Clara Kauffman presented her bill of exceptions to the ruling of the Court of October 14, 1889, on her plea to jurisdiction filed October 12, 1889, which was allowed October 30, 1889; and also jointly with her co-defendant a bill of exception to the ruling of the Court on their plea of *res judicata* (Rec., 40, *et seq.*) Both defendants appealed, and on January 9, 1890, assigned errors, wherein Clara Kauffman separately assigned as error the action of the Court in respect to the matter of jurisdiction over her, and jointly with her co-defendant assigned as error the actions and rulings of the Court in various matters not connected with the question of jurisdiction (Rec., 67, *et seq.*)

The Supreme Court of Texas affirmed the case as to Clara Kauffman, but adjudged a dismissal as to Julius Kauffman, which was done (Rec., 71–6), and Clara Kauffman sued out this writ of error.

Many very interesting questions came up and were passed on in this cause, but they are all out of the record so far as this writ of error is concerned, and but one question, if that, is before this Court. The assignment of error in asking for the writ of error (Rec., 77) is a meagre and obscure presentation of the matter complained of—indeed it is so much so this Court could not, under the rules of practice, consider it. This question must be made to appear distinctly.

Foster Fed. Pr., p. 615; Curtis, Juris. U. S. Courts, 37–39; Spear Fed. Jud., 584, and cases cited.

The question presented must have been passed on by the Court below in the very case appealed from, or in which the writ of error is sought. It must have formed a part of the matter, at least, adjudicated by the Court below in the case asked to be reversed.

Detroit, etc., v. *Guthrad, 114 U. S., 133.*
Freeman v. *Nichol, 8 Wall., 44.*
Forney v. *Towle, 1 Black, 350.*
Christ Church v. *County, etc., 20 How., 26, and cases cited.*

Here the Court below passed no judgment properly speaking upon this alleged question. It said merely "that the Court had acquired jurisdiction as to her (Clara Kauffman), was held in a former appeal." The Court then adjudicated nothing about it, but took the opinion and judgment of the Court on a former appeal which is not here in question at all. From the judgment of the State Supreme Court settling this question of jurisdiction there is no appeal, or contest here of any kind. In point of law and of fact, then, there is no adjudication of this question in this case; therefore, there is no question upon it properly before this Court.

This matter, it would seem then, should be concluded right here. But if the Court should think its duty to be to search the record and find out the *Federal* question attempted to be raised, and that it was passed on in the judgment and opinion of the Court in the proceeding brought here by this writ of error, then let us see just what it is.

The point is set forth several times in the record here (Rec., 40), but possibly it is more fully stated in the assignment of errors in the District Court of Texas, on taking an appeal to the Supreme Court of the State, January 9, 1890 (Rec., 68), and is as follows:

VI. *That the Court erred in its order made on the 13th of October, 1885, as follows: "And the plea as to service by publication on the defendant, Mrs. Clara Kauffman, was acted upon at the last term of Court, and the service, on motion of her attorney, was quashed, as the publication was made on four consecutive Sundays; and now the defendant renews her said plea to the jurisdiction, and claims she is not subject to the jurisdiction of the Court, in that no other service than said publication was ever made on her, and it being the opinion of the Court that said service having on her motion been quashed at the last term, she is now by virtue of the spirit of the statute legally in Court at the present term, the same as if there had been personal service on her, and to this ruling she excepts." And the Court erred in its judgment entered on the 14th of October, 1889, in overruling defendant Clara Kauffman's plea to the jurisdiction of the Court filed October 12, 1889, as the pleading and testimony in the cause shows that said Clara Kauffman long before, at the time, and since the institution of this suit, until the said trial of said cause on the 14th of October, 1889, was a non-resident of the State of Texas, and was a resident of the Empire of Germany; that she never appeared personally nor received service of citation, or authorized any one to receive service for her, nor did she waive service of citation or authorize any one to waive service of citation or notice of the institution of this suit for her, nor did she authorize any person to appear for her, except to object specially to the jurisdiction of this Court, as is shown by the record in the cause, and that the Court erred in assuming jurisdiction of the case over her person, who, through her attorneys, was protesting against the Court's so taking jurisdiction, and that the said several rulings of the Court are in violation of the Constitution of the United States, said jurisdiction being assumed and taken without "due process of law" and in violation of the law of the land, no service being made on her personally or otherwise, and no voluntary appearance being made by her in said suit.*

If any question could safely be said to rest entirely on Texas law, as construed and administered by its courts, this one could. It is nothing but a dispute about a law of Texas, in no manner touched or affected by any law, treaty, or any act under any authority of the United States; and this identical question, in this very suit, has been determined now several times by the Supreme Court of Texas and the District Court of Galveston County in which this cause originated.

Upon the general feature of the contest, we need go no further than *Mitchell* v. *Clark, 110 U. S., 638*, where this language is used: "The plea is made in a State court, and sets up a defense under the State law, and however much the party may be aggrieved by that court's decision, he, in that plea, sets up an immunity under a State law, and not under the law of the United States; *of such matters this Court has no jurisdiction, and we consider it no further.*"

See, also—

Granby v. *Clark, 134 U. S., 338.*
Beatty v. *Benton, 135 ib., 244.*
Union Bank v. *Kansas City, 136 ib., 223.*

For all varieties of cases coming under this proposition, see—

Danforth's Digest, U. S. Sup. Ct., 471–5.

But, as coming more directly, if possible, to the point here, see *Sugg* v. *Thornton, 132 U. S., 524 et seq.*, a case from Texas, involving the construction of its process act.

Still more, as reaching in every respect, the very point here attempted to be made, the recent decision of this Court in *York* v. *The State of Texas, No. 999 at the present term*, decided by Mr. Justice Brewer, November 3, 1890, is conclusive. This, too, was a case construing the process act of Texas; and the effect of pleading to the jurisdiction, motion

to quash service, and in fact all that we have here, came up in that case, and the ruling is in full accord with what the courts (Supreme and District) of Texas have heretofore made in this case, and that is, that under the process act of that State Mrs. Clara Kauffman is in the court as fully and completely as if she had been served with process personally. The innovation upon generally recognized rules in this regard, by the State of Texas, noticed by the Court in the *York* case, is but a step in reformation that is being followed in other States, and one which the Federal courts have pretty generally recognized. Mrs. Kauffman should have come in or staid out. She came in according to the rule in Texas, and that ends it. If she had staid out, and this service was of no validity, it is clearly pointed out in the *York* case, how she could have been relieved, but certainly not in this method, for she *appeared* in the suit, according to the rule of law in Texas, and that satisfied the doctrine of *Pennoyer* v. *Neff*, *95 U. S., 714*, if the question were an open one here.

The history of this case clearly settles there is no *Federal* question here, and it settles more than that: if such a question was here, the claim that the service of the process or the notice to Mrs. Kauffman is not *due process of law* is frivolous. "The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. *York* v. *Texas*, *sup.*; *Antoni* v. *Greenhow*, *107 U. S., 769*; *Pennoyer* v. *Neff*, *sup.* The process here gave Mrs. Kauffman her *day in court*, so completely that she knew it, acted on it, in employing able and indefatigable attorneys to appear for her, and they did *appear*, not merely technically as to jurisdiction, but to the merits, and defended most zealously and tenaciously for one-half of the average human lifetime, and now at this late day, years, too, after this one question was de-

termined in the Supreme Court of Texas, previous to the decision now before this Court, she questions the validity of those proceedings. She has had her *opportunity to be heard*, and she has been heard to the utmost, upon all the questions arising in this aged suit, and she ought now to be heard no more.

There can then be no *Federal* question here; but if even the shadow of one can be discovered by the Court, it is frivolous to the last degree, and any further attempt to argue it upon its supposed or alleged merits would be too large a demand on the submission and even the patience of the Court.

Respectfully submitted.

A. H. Garland,
H. J. May,
Counsel for Defendant in Error.

Notice of Motion.

To T. N. Waul, Esq., attorney of record in the Supreme Court of the United States, and to Messrs. Waul & Walker, all of Galveston, Texas, attorneys of record in the Court below for the above-named Clara Kauffman:

You are hereby notified that the defendant in error in the above-named cause will on Monday, the fifth (5th) day of January next (1891) on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion and papers.

Very respectfully,

A. H. Garland,
H. J. May,
Counsel for Defendant in Error.